SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 667

SAMUEL F. RATHBUN, AS EXECUTOR OF THE ESTATE OF WILLIAM E. HUMPHREY, DECEASED,

vs.

THE UNITED STATES

ON CERTIFICATE FROM THE COURT OF CLAIMS

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[fol. 1]

IN COURT OF CLAIMS OF THE UNITED STATES

No. 42650

SAMUEL F. RATHBUN, as Executor of the Estate of WILLIAM E. HUMPHREY, Deceased,

v.

THE UNITED STATES

STATEMENT OF FACTS AND CERTIFICATE

Messrs. Ralstone R. Irvine, William J. Donovan, and Henry H. Bond appeared for the plaintiff.

Messrs. George C. Sweeney, James W. Morris and Paul A. Sweeney appeared for the defendant.

Before Chief Justice Booth, Judge Green, Judge Littleton, Judge Williams, and Judge Whaley.

STATEMENT OF FACTS

The Court of Claims hereby certifies that the record of the above-entitled case now pending before it discloses the following materials facts, taken from plaintiff's petition filed April 28, 1934:

(1) The decedent, William E. Humphrey, died on February 14, 1934, a citizen of the United States and of Seattle, Washington, and temporarily resident at 2400 Sixteenth Street, Northwest, City of Washington, District of Columbia, leaving a Last Will and Testament naming Samuel F. Rathbun, of Seattle, Washington, as executor. The said Last Will and Testament was duly admitted to probate by the [fol. 2] Superior Court of the State of Washington for the County of King, on March 20, 1934. Letters testamentary were granted on that day to the said Samuel F. Rathbun, executor, the plaintiff herein. The said plaintiff is still acting as such executor and the said Letters are in full force and effect at the time of filing this suit. An authenticated copy of the record of the appointment of the plaintiff as such executor is filed herewith.

(2) On January 26, 1925, the decedent, William E. Humphrey, was nominated by the President of the United States as a Federal Trade Commissioner for a term expiring September 25, 1931, to fill a vacancy on the Federal Trade Commission. Such nomination was confirmed by the United States Senate, as signified by its action on February 23, 1925. Pursuant to such nomination and confirmation, the President issued to the decedent his written commission appointing him a Federal Trade Commissioner for a term of seven years ending September 25, 1931. The decedent received and accepted such commission. On February 25, 1925, he took the oath of a Federal Trade Commissioner, and thereupon entered upon his duties of his office and continued in the satisfactory performance of such duties.

(3) On June 30, 1931, the decedent again was appointed and commissioned by the President, during the recess of the Senate, as a Federal Trade Commissioner for a term ex-
[fol. 3] piring September 25, 1938, to serve during the pleasure of the President for the time being and until the end of the next session of the Senate and no longer. The decedent received and accepted such commission. On September 24, 1931, he took the oath of a Federal Trade Commissioner, and on September 26, 1931, entered upon the duties of his office and thereafter continued in the satisfactory performance of such duties.

(4) On December 10, 1931, the decedent again was nominated by the President as a member of the Federal Trade Commission for a term of seven years ending September 25, 1938. On January 27, 1932, such nomination and appointment of the decedent as a member of the Federal Trade Commission by the President was confirmed by the United States Senate, as signified by its action on that date in accordance with section 1 of the Federal Trade Commission Act (38 Stat. 717, Sec. 1). In pursuance of such nomination and confirmation, the President of the United States, on January 27, 1932, issued to the decedent his written commission appointing him a member of the Federal Trade Commission for a term of seven years expiring September 25, 1938.

The said written commission provides as follows:

Herbert Hoover,

President of the United States of America

To all who shall see these presents Greeting:

Know Ye, that reposing special trust and confidence in the *Integrity and Ability of William E. Humphrey, of Washington,* I have nominated, and, by and with the advice [fol. 4] and consent of the Senate, do appoint him *a Federal Trade Commissioner for a term expiring September 25, 1938,* and do authorize and empower him to execute and fulfill the duties of that Office according to law, and to have and to hold the said Office, with all the *powers, privileges and emoluments,* thereunto of right appertaining, unto him the said *William E. Humphrey, subject to the conditions prescribed by law.*

In testimony whereof, I have caused these Letters to be made Patent, and the Seal of the United States to be hereunto affixed.

Done at the City of Washington this *twenty-seventh* day of *January,* in the year of our Lord one thousand nine hundred and *thirty-two,* and of the Independence of the United States of America the one hundred and *fifty-sixth.*

(Signed) Herbert Hoover.

By the President:

Henry L. Stimson, Secretary of State. (Seal.)

(5) The decedent received and accepted the said commission as a member of the Federal Trade Commission. On February 5, 1932, he took the required oath of office as such member, and thereupon entered upon the duties of his office, and at all times thereafter and until prevented from so doing, as hereinafter stated, continued in the satisfactory performance of such duties.

(6) On or about July 19, 1933, the decedent sent a letter to the President of the United States stating that information had come to him that the President was about to ask for his resignation; that he did not know the reason for such request; that he had been in public service for the greater part of forty years and was not aware of any act or thing

discreditable or disloyal in his record; and that he asked [fol. 5] for a personal interview with the President regarding this matter.

(7) In response to this letter, the decedent, on or about July 29, 1933, received from the President of the United States the following letter:

The White House, Washington

July 25, 1933.

MY DEAR COMMISSIONER:

In reply to your letter of last week, I regret that the present demands on my time make it impossible at the moment to grant your request for a personal interview.

Without any reflection at all upon you personally, or upon the service you have rendered in your present capacity, I find it necessary to ask for your resignation as a member of the Federal Trade Commission. I do this because I feel that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection.

May I take this opportunity to tell you that at the earnest request of Senator Dill, I have been withholding this action for some time but have now reached a definite decision to proceed along the lines I have in mind.

I congratulate you upon your long and active service.

Sincerely yours, (Signed) Franklin D. Roosevelt.

Hon. William E. Humphrey,
2400 Sixteenth Street,
Washington, D. C.

(8) On or about August 1, 1933, the decedent replied to the above letter, dated July 25, 1933, and stated that as he had been long out of the practice of his profession and had lost all of his connections therewith, he asked time to consult his friends in regard to his future actions. The letter did not state or imply that the decedent tendered his resignation as a Federal Trade Commissioner.

[fol. 6] (9) In spite of the fact that the decedent was denied a hearing and that he did not tender his resignation,

the President of the United States on August 4, 1933, sent the following telegram to the decedent:

Hyde Park, N. Y., August 4, 1933, 11:52 a. m.

Hon. Wm. E. Humphrey, Federal Trade Commission, Washington, D. C.

I have your letter and I fully appreciate your desire to have a little time to make arrangements. Therefore I am accepting your resignation but not to take effect until August fifteenth. Please acknowledge receipt.

Franklin D. Roosevelt.

(10) In response to this telegram, the decedent, on August 11, 1933, sent to the President of the United States a letter stating that:

In acknowledging your telegram of August fourth, I thank you for the courtesy and consideration shown. You say, "I am accepting your resignation." In this you are in error, as I have not tendered my resignation as a member of the Federal Trade Commission, and cannot do so. If any document purporting to be my resignation has been presented to you, it was without my authority, consent or knowledge.

As all of my requests for a personal interview have been denied, I feel that it is a duty I owe the public and myself to briefly state why I cannot comply with your request.

The letter then stated that since the Federal Trade Commission Act provided the grounds for removing a Commissioner, a compliance with the President's request in the public mind would indicate he resigned to avoid removal for cause; that the President acknowledged that his request was without reflection upon the decedent personally or upon [fol. 7] his official service, but only so that the work of the Commission "can be carried out more effectively with the personnel of my own selection"; that Congress intended the Federal Trade Commission should be an independent semi-judicial body at all times, the members of which would be independent of the will of the President and would be subject to removal by the President only for the causes stated in the statute; and that since the President did not question the way in which the decedent had conducted his office of a Federal Trade Commissioner, he declined the re-

quest of the President to tender his resignation for purely political reasons because to do so would violate the statute and constitute consent to a policy that would lessen the value of the Federal Trade Commission and all independent bodies.

(11) On August 31, 1933, the President sent the following letter to the decedent:

Hyde Park, New York, August 31, 1933.

The White House, Washington

MY DEAR COMMISSIONER HUMPHREY:

I am sure that I do not need to tell you that I would not wish to hurt you in any way if it can possibly be avoided, and that is why I still hope that you will be willing to let me have your resignation as a member of the Federal Trade Commission.

You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence.

I have, as you know, delayed presenting this matter for many weeks. I am leaving today to return to Washington [fol. 8] by water, and I shall not get there until next Tuesday morning. I feel that, for your sake and for mine, it would be much better if you could see this point of view and let me have your resignation on any ground you may care to place it, when I return.

Very sincerely yours, (Signed) Franklin D. Roosevelt.

Honorable William E. Humphrey, Federal Trade Commission, Washington, D. C.

(12) In response to this letter the decedent, on September 11, 1933, sent a letter to the President stating that he knew of none of his official acts which indicated that the minds of the President and the decedent did not "go along together"; that this was the first time he had information that any of his views on either the policies or administration of the Federal Trade Commission Act differed from those of the President; that the Commission had for the last four years acted in harmony on matters of policy and

administration; that if the President had heard anything otherwise regarding his acts as a Commissioner or regarding his attitude as to the policies or administration of the Federal Trade Commission Act is [it] was misleading and untrue; that he had always performed his official duties as required by the statute; and that he again requested a hearing to demonstrate that his official acts do not in any way show "our minds do not go along together" or that there was any reason why the President should not have his full confidence.

(13) On September 27, 1933, the decedent sent the following letter to the President of the United States:

[fol. 9] Federal Trade Commission, Washington

September 27, 1933.

William E. Humphrey, Commissioner.

My dear Mr. President:

It is my understanding that you desire me to consider the question as to whether it would not be best for the public good, in view of your feelings towards me, to resign regardless of any legal question involved in the matter.

Misunderstanding is entirely the cause of your attitude towards me, but as you have refused to permit me to give you the facts, of course it is impossible for you to know the truth and it is futile to discuss this proposition further.

Referring to your wish, as I have stated above, I beg to suggest that by reason of the wide publicity given to the controversy the situation has been greatly changed. I want you to know that I did not give out a word of this publicity, and tried to prevent it. This publicity clearly shows that if I leave the Commission, at once the matter will become a party issue. The comments that I have seen in the press, regardless of party affiliation, universally condemned anything that would tend toward this result. The worst possible thing that could happen to the Commission, short of abolishing it, would be to make it a partisan body. If this is done, every time a confirmation for the appointment of a Commissioner comes up, or an appropriation is to be made, or any matter in connection with the Commission is to be considered, the Commission would be attacked,

condemned and misrepresented, regardless of what the truth might be. To make the Commission a political body would be in letter and in spirit a violation and disregard of the statute creating it, and would be contrary to the hopes and aims of all parties who joined in passing the Federal Trade Commission Act.

My resignation, after this wide publicity, would be, in my opinion a great injury to the Commission and to the public.

Very truly yours, (Signed) W. E. Humphrey.

The President, White House.

(14) In response to this letter of September 27, 1933, the [fol. 10] President sent the following letter to the decedent:

October 7, 1933.

The White House, Washington

MY DEAR COMMISSIONER HUMPHREY:

I am in receipt of your letter of September twenty-seventh.

Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission.

Sincerely yours, (Signed) Franklin D. Roosevelt.

Hon. William E. Humphrey,
Commissioner,
Federal Trade Commission,
Washington, D. C.

(15) On October 7, 1933, the President notified the Federal Trade Commission that he had removed the decedent from the office of a member of the Federal Trade Commission.

(16) On October 9, 1933, the decedent sent the Federal Trade Commission the following letter:

October 9, 1933.

To the Federal Trade Commission:

GENTLEMEN:

You have probably received a copy of the communication issued by the President, purporting to be an order removing me from office as a Member of the Federal Trade Commission.

I refuse to recognize such order as valid, or as being within the President's rightful powers. I am convinced that the order is without warrant of law and is ineffectual. I am, therefore, notifying you that I am still a Member of the Federal Trade Commission and am ready and willing to exercise the powers and functions of my said office, and to participate in all the deliberations and official actions of the Commission.

[fol. 11] Should the Commission decide to deny my said rights, then I ask that such action be made of record, and a statement of the reasons for such actions be made. If the Commission shall decide the matter in my favor, I shall continue to perform the duties of my said office.

Respectfully submitted, (Signed) W. E. Humphrey.

(17) On October 9, 1933, the Federal Trade Commission replied to this letter by sending the decedent a copy of the entry it made that day on its minutes, which entry set forth the letter it received that day from the decedent (set forth in paragraph 16 hereof), and the letter to the decedent from the President (set forth in paragraph 14 hereof). The entry then stated that the Federal Trade Commission recognized the validity of said Executive Order of the President removing the decedent and that the Commission declined further to recognize the decedent as a member of the Federal Trade Commission.

(18) On October 9, 1933, the decedent wrote the following letter to the Disbursing Officer of the Federal Trade Commission:

October 9, 1933.

Mr. Rudolph B. Schwickardi,
Disbursing Officer,
Federal Trade Commission.

DEAR SIR:

I have reason to believe that the President has sent to the Federal Trade Commission a communication purporting to be an order removing me as a Member of the Commission.

No order made by the President purporting to remove me has any warrant in law and is ineffectual in law or in fact, to terminate my said office. I am, therefore, notifying you that I am still a Member of the Federal Trade

Commission and am lawfully entitled to the emoluments [fol. 12] of my office, and that I demand that pay checks be issued regularly in payment of my salary as such officer.

Very truly yours, (Signed) William E. Humphrey.

(19) On or about October 15, 1933, the decedent received a check from the Disbursing Clerk of the Federal Trade Commission in the amount of $165.27 as his salary as a Federal Trade Commissioner for the period from and including October 1 to and including October 7, 1933. The decedent, on October 17, 1933, sent a letter to the said Disbursing Clerk acknowledging receipt of the check in the amount of $165.27, and notifying the Disbursing Clerk that he demanded the payment of the balance of his salary for the month of October at the regular payment date, which would be October 31, 1933.

(20) On October 27, 1933, George C. Mathews took the oath of a member of the Federal Trade Commission to fill the vacancy created by the removal of the decedent, and said George C. Mathews entered upon the duties of a member of the Federal Trade Commission for a term expiring September 25, 1938, during the pleasure of the President and until the end of the next session of the United States Senate and no longer, thereby exercising the powers and privileges, and receiving the emoluments of the office of a member of the Federal Trade Commission claimed by decedent.

[fol. 13] (21) On October 27, 1933, the decedent sent the following letter to George C. Mathews notifying him that the decedent claimed that he was still a member of the Federal Trade Commission, and claimed the emoluments of that office to the expiration of his present term:

October 27, 1933.

Honorable George C. Mathews,
Federal Trade Commission,
Washington, D. C.

Dear Sir:

You are hereby notified that your appointment as Federal Trade Commissioner is invalid, because there was no vacancy to which you could be appointed, and you are notified that I am still a member of the Federal Trade Commission,

filling the term for which you are supposed to be appointed, and that I claim and shall claim the emoluments of the said office to the expiration of my present term.

Very truly yours, (Signed) W. E. Humphrey.

(22) On November 2, 1933, the decedent sent letters to the Federal Trade Commission, to the Secretary of the Federal Trade Commission, to the Chief of Accounts and Personnel of the Federal Trade Commission, and to the Disbursing Clerk of the Federal Trade Commission, all of which letters are identical and one of which reads as follows:

November 2, 1933.

To the: Federal Trade Commission, Otis B. Johnson, Secretary of the Federal Trade Commission; Andrew N. Ross, Chief of Accounts and Personnel; Rudolph B. Schwickardi, Disbursing Clerk.

[fol. 14] I hereby notify you and each of you that I am a member of the Federal Trade Commission and that the order made by the President of the United States purporting to remove me from my said office was and is without warrant of law and void and is not effective to terminate the term of my said office.

That the action of the Federal Trade Commission heretofore taken in refusing to recognize me as Commissioner and in refusing to permit me to perform my said duties as a member of the Federal Trade Commission is without legal effect and void.

That I am at all times ready, willing and able to perform the duties of my said office.

I, therefore, hereby demand of you and each of you that you take the necessary and proper action to cause to be paid to me at this time, the balance in full of my salary as such Commissioner for the month of October, 1933, and also that such necessary and proper action be taken by you and each of you at the proper times until the end of my official term as Commissioner on September 25, 1938, to pay to me in full my several monthly salaries as such member of the Federal Trade Commission.

Very truly yours, (Signed) W. E. Humphrey.

(23) The decedent, on November 28, 1933, sent letters to the Federal Trade Commission, to the Secretary of the Commission, to the Chief of Accounts and Personnel of the

Commission and to the Disbursing Clerk of the Commission identical to the letter set forth in paragraph 22 hereof, except that he demanded his salary as Commissioner for the month of November, 1933.

On December 14, 1933, the decedent sent similar letters to the same persons demanding his salary for the month of December, 1933.

(24) The services of the decedent as a member of the Federal Trade Commission, at all times while in possession of and exercising the duties of the said office, were satisfactorily and properly performed. At no time were any charges of any kind presented against him by the President [fol. 15] of the United States or the United States Senate or otherwise, nor was the question of his removal from said office submitted to the Senate for action thereon, nor was any action taken by the Senate with reference to the attempted removal of the decedent as a member of the Federal Trade Commission. The decedent was not removed from his office as aforesaid on account of any inefficiency, neglect of duty, or malfeasance in office. The decedent alleged that there was no valid reason for the action of the President in removing him from his office. The decedent was never granted a hearing as to the reasons for his removal from his office although he frequently requested a hearing.

(25) On January 4, 1934, the United States Senate received a list of Executive nominations, including that of George C. Mathews, of Wisconsin, to be Federal Trade Commissioner for the term ending September 25, 1938. On January 19, 1934, the nomination of the said George C. Mathews was reported favorably to the Senate and ordered to be placed on the calendar. On January 31, 1934, the Senate confirmed the nomination of George C. Mathews to be a Federal Trade Commissioner.

(26) The petition alleges that "the attempted removal of the decedent by the President of the United States from his office of Federal Trade Commissioner was illegal and void, and did not constitute a removal of decedent from [fol. 16] said office, nor lawfully deprive him of nor affect his right to the powers, privileges and emoluments thereof, nor his right to perform or discharge the functions of said office."

(27) At all times on and after October 7, 1933, until his death on February 14, 1934, the decedent was without employment in any other capacity, and was ready and willing to perform the duties of said office, and constantly during all of said time held himself in readiness for that purpose.

(28) The removal of the decedent by the President was not consented to or acquiesced in at any time by the decedent, who ever objected to and denied the authority and legality of such action of the President in attempting to remove him from his office, and of the Federal Trade Commission in refusing to permit him to exercise the duties of his office, and of the Chief Clerk of Accounts and Personnel and the Disbursing Clerk of the Federal Trade Commission in refusing to pay to him the salary to which he was entitled as a Federal Trade Commissioner.

(29) No part of the emoluments of said office has been paid to the decedent or the plaintiff, or anyone acting, serving or pretending to act as the agent of either of them, for the period from and including October 8, 1933, to the date of decedent's death on February 14, 1934.

[fol. 17] (30) Under and by virtue of section 2 of the Federal Trade Commission Act (38 Stat. 717, Sec. 2), the decedent, Humphrey, was entitled as a member of the Federal Trade Commission to a salary at the rate of ten thousand dollars ($10,000.00) a year, payable in equal monthly installments "in the same manner as the salaries of the judges of the courts of the United States" (except that for the period from April 1, 1933, to January 31, 1934, inclusive, the salary was to be at the rate of eight thousand five hundred dollars ($8,500.00) a year and for the period from February 1, 1934, to February 14, 1934, inclusive, the salary was to be at the rate of nine thousand dollars ($9,000.00) a year, in accordance with the provisions of the Act of March 20, 1933, Public No. 2, Title II, Section 2, as amended by the Independent Offices Appropriation Act, 1935, enacted March 28, 1934, and in accordance with Executive Order No. 6085, promulgated March 28, 1933, and Executive Order No. 6188, promulgated July 3, 1933, and Executive Order No. 6553, promulgated January 9, 1934). The salary by law directed to be paid to the decedent as a member of the Federal Trade Commission was paid to

him uninterruptedly each month from February 25, 1925, to and including October 7, 1933, since which date he was not paid any part of his salary.

(31) Such salary of a member of the Federal Trade Commission for the period from and including October 8, [fol. 18] 1933, to and including February 14, 1934, amounts in the aggregate to three thousand forty-three dollars and six cents ($3,043.06), no part of which has been paid to the decedent or plaintiff and all of which plaintiff claims is due him from the United States, and although such salary has been frequently demanded payment has been refused.

(32) This action is based upon sections 1 and 2 of the Federal Trade Commission Act, approved September 26, 1914 (38 Stat. 717. Chapter 311) which provide in part as follows:

"* * * That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the Commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. * * *"

"Sec. 2. That each commissioner shall receive a salary of $10,000 a year, payable in the same manner as the salaries of the judges of the courts of the United States. * * *"

(33) No other action, suit, or process by the plaintiff or assignee of him is pending for or in respect of the plain-

[fol. 19] tiff's claim against any person acting or professing to act, mediately or immediately, under the authority of the United States; no person other than the plaintiff is the owner of the said claim or interest therein; no assignment or transfer of said claim or any part thereof or interest therein has been made; no other action than as aforesaid has been had on this claim in Congress or in any of the Departments. The amount herein claimed from the United States is not subject to any credits or offsets; the decedent and plaintiff have at all times borne true allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the Government of the United States. The plaintiff is a citizen of the United States.

Wherefore, the plaintiff prays judgment against the United States in the sum of $3,043.06, together with interest thereon from the date such salary was due and payable, together with the costs and disbursements of this action.

To this petition the defendant has filed a demurrer, on the ground that the petition does not state a cause of action against the United States.

The defendant, by the filing of this demurrer, admits the facts stated in the petition to be true, and upon the [fol. 20] record before it the court finds it necessary for a proper disposition of the case that certain questions of law should be determined. They are as follows:

QUESTIONS CERTIFIED

1. Do the provisions of section 1 of the Federal Trade Commission Act, stating that "any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office", restrict or limit the power of the President to remove a commissioner except upon one or more of the causes named?

If the foregoing question is answered in the affirmative, then—

2. If the power of the President to remove a commissioner is restricted or limited as shown by the foregoing interrogatory and the answer made thereto, is such a re-

striction or limitation valid under the Constitution of the United States?

Fenton W. Booth, Chief Justice. Wm. R. Green, Judge. Benjamin H. Littleton, Judge. T. S. Williams, Judge. Richard S. Whaley, Judge.

[fol. 21] I, Willard L. Hart, Chief Clerk of the Court of Claims of the United States, do hereby certify that the foregoing certificate in the case of Samuel F. Rathbun, as Executor of the Estate of William E. Humphrey, deceased, v. The United States, No. 42650, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof, I hereunto subscribe my name and affix the seal of the Court of Claims of the United States, at my office in Washington, D. C., this 25th day of January, A. D., 1935.

Willard L. Hart, Chief Clerk, Court of Claims of the United States. (Seal.)

Endorsed on cover: File No. 39,295. Court of Claims. Term No. 667. Samuel F. Rathbun, as Executor of the Estate of William E. Humphrey, Deceased, vs. The United States. Certificate. Filed January 26, 1935. File No. 667, O. T., 1934.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 667.

SAMUEL F. RATHBUN, as Executor of the Estate of WILLIAM E. HUMPHREY, Deceased,

vs.

THE UNITED STATES.

On Certificate from the Court of Claims.

BRIEF FOR SAMUEL F. RATHBUN, EXECUTOR.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Argument:

I. Do the Provisions of Section 1 of the Federal Trade Commission Act, Stating That "Any Commissioner May Be Removed by the President for Inefficiency, Neglect of Duty, or Malfeasance in Office", Restrict or Limit the Power of the President to Remove a Commissioner Except Upon One or More of the Causes Named? 8

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 667.

SAMUEL F. RATHBUN, as Executor of the Estate of WILLIAM E. HUMPHREY, Deceased,

vs.

THE UNITED STATES.

On Certificate from the Court of Claims.

BRIEF FOR SAMUEL F. RATHBUN, EXECUTOR.

OPINION OF THE COURT BELOW.

No opinion was delivered by the court below. The questions certified to this court appear at pages 15 and 16 of the Record (hereinafter referred to as R).

GROUNDS FOR JURISDICTION.

The questions here presented were certified to this Court by the Court of Claims in accordance with the provisions

of the Act of February 13, 1925, c. 229, 43 Stat. 939, 28 U. S. C. A. Sec. 288, which provides in part as follows:

> "(a) In any case in the Court of Claims, including those begun under section 287 of this title, that court at any time may certify to the Supreme Court any definite and distinct questions of law concerning which instructions are desired for the proper disposition of the cause; and thereupon the Supreme Court may give appropriate instructions on the questions certified and transmit the same to the Court of Claims for its guidance in the further progress of the cause."

QUESTIONS CERTIFIED.

1. Do the provisions of section 1 of the Federal Trade Commission Act, stating that "any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office", restrict or limit the power of the President to remove a commissioner except upon one or more of the causes named?

If the foregoing question is answered in the affirmative, then—

2. If the power of the President to remove a commissioner is restricted or limited as shown by the foregoing interrogatory and the answer made thereto, is such a restriction or limitation valid under the Constitution of the United States? (R. 15, 16).

STATEMENT OF THE CASE.

The certificate of the Court of Claims discloses the following material facts, which were taken from plaintiff's petition filed April 28, 1934.[1]

This is a suit to recover the sum of $3,043.06 together with interest thereon, alleged to have been due and payable

[1] The defendant filed a demurrer to plaintiff's petition on the ground that the petition does not state a cause of action against the United States. The defendant by the filing of this demurrer admits the facts stated in the petition to be true.

to William E. Humphrey, deceased, as salary as a Federal Trade Commissioner from the date of his purported removal by the President on October 8, 1933, to decedent's death on February 14, 1934. (R. 15).

Samuel F. Rathbun (hereinafter sometimes referred to as the plaintiff) is the duly appointed Executor of the Last Will and Testament of the decedent. (R. 1).

On February 23, 1925, the decedent, William E. Humphrey, was duly appointed a Federal Trade Commissioner for a term of seven years ending September 25, 1931. On June 30, 1931, during a recess of the Senate, he was again appointed a Federal Trade Commissioner for a term expiring September 25, 1938, to serve during the pleasure of the President for the time being and until the end of the next session of Congress. (R. 2).

On January 27, 1932, the President of the United States, by and with the advice and consent of the Senate of the United States, again appointed the decedent a Federal Trade Commissioner for a term expiring September 25, 1938, and issued to him a commission evidencing such appointment. On February 25, 1932, the decedent took the required oath of office and entered upon the exercise of the duties of a Commissioner. It is alleged in the petition that the decedent at all times therein set forth satisfactorily performed the duties of Federal Trade Commissioner. (R. 2, 3).

Between July 11, 1933, and October 7, 1933, an exchange of communications took place between the President of the United States and the decedent. (R. 3-8.) By letter dated July 25, 1933, the President requested decedent's resignation as a Federal Trade Commissioner as follows:

> "Without any reflection at all upon you personally, or upon the service you have rendered in your present capacity, I find it necessary to ask for your resignation as a member of the Federal Trade Commission. I do this because I feel that the aims and purposes of the Administration with respect to the work of the

> Commission can be carried out most effectively with personnel of my own selection." (R. 4).

By letter dated October 7, 1933, the decedent was advised by the President that—

> "Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission." (R. 8).

The decedent duly protested the legality of his purported removal and addressed letters evidencing his protest to the President of the United States, the Federal Trade Commission, the Secretary of the Federal Trade Commission, the Chief of Accounts and Personnel, and to the Disbursing Clerk of the Commission. (R. 8-12).

On October 27, 1933, George C. Mathews was appointed by the President to fill the vacancy created by the removal of the decedent for the term expiring September 25, 1938, during the pleasure of the President and until the end of the next session of the United States Senate. On October 27, 1933, the decedent notified George C. Mathews that the decedent was still a member of the Federal Trade Commission and that he claimed the emoluments of that office until the expiration of his present term. (R. 2).

On January 19, 1934, the President of the United States, with the advice and consent of the Senate, appointed George C. Mathews to be Federal Trade Commissioner for the term ending September 25, 1938. On January 31, 1934, the Senate confirmed the nomination.

The services of the decedent as a member of the Federal Trade Commission, at all times while in possession of and exercising the duties of the said office, were satisfactorily and properly performed. At no time were any charges of any kind presented against him by the President of the United States or the United States Senate or otherwise, nor was the question of his removal from said office submitted to the Senate for action thereon, nor was any action taken by the Senate with reference to the attempted

removal of the decedent as a member of the Federal Trade Commission. The decedent was not removed from his office as aforesaid on account of any inefficiency, neglect of duty, or malfeasance in office. There was no valid reason for the action of the President in removing decedent from his office and the decedent was never granted a hearing as to the reasons for his removal from his office although he frequently requested a hearing. (R. 12).

STATUTE INVOLVED.

Section 1 of the Federal Trade Commission Act.[2]

"An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

"The commission shall have an official seal, which shall be judicially noticed."

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[2] Act of September 26, 1914 (38 Stat., 717).

SUMMARY OF ARGUMENT.

I. The provision of Section 1 of the Federal Trade Commission Act that "Any commissioner may be removed by the President for inefficiency, neglect of duty or malfeasance in office," restricts the power of the President to remove except upon one or more of the causes stated. Section 1 recites that the commissioners "shall continue in office" for their respective terms. The subsequent enumeration of causes for removal shows the intention of Congress to authorize the President to remove commissioners for the causes stated and for no other. The Committee Reports and the statements of the members in Congress in charge of the Federal Trade Commission Act show clearly that the Congress intended that the President should not have an unrestricted power of removal. The rule of construction expressed in the maxim *expressio unius est exclusio alterius* should therefore be applied. The *Shurtleff* case, (189 U. S. 311, 1903) represents an exception to the rule of construction expressed in this maxim, and should be limited in its application to the peculiar facts of that case.

The duties and functions of the Federal Trade Commission are inconsistent with an unrestricted power of removal in the President. The Federal Trade Commission was intended to be an independent body. The power to remove an officer is the power to dominate and control him. The Commission has quasi legislative and quasi judicial functions. The theory of a separation of powers between the executive, legislative and judicial branches of government is inconsistent with the domination of such an agency by the President through the exercise of an unrestricted power of removal.

II. The Congress under the Constitution may enact reasonable legislative *standards* to be followed by the President in the exercise of his exclusive power to remove. To establish such standards is not equivalent to requiring Con-

gressional consent to removal and is analogous to standards of appointment which limit the eligible class from which nominations may be made by the President. The extent of such power of the Congress is dependent upon the nature of the office involved. This conclusion is supported by history and by the decisions of this Court.

An examination of the debates relating to the "Decision of 1789" discloses that the sponsors of the bill there considered believed that the President and not Congress had the power to remove officers whose duties were purely executive but that where the nature and function of the office required that the incumbent be reasonably safe from arbitrary removal by the President the Congress could enact reasonable standards to be followed by the Executive in the exercise of his power. The reasonableness of restrictions imposed upon the power of removal was to be judged in the light of the nature and function of the office involved.

In many cases this Court has assumed that Congress might restrict the power of the President to remove officers of the United States. All such cases involved offices whose functions require that the incumbent be reasonably secure from arbitrary removal. In those cases (such as the *Myers* case, 272 U. S. 52, 1926), in which the authority of Congress to restrict the President's power of removal was denied it was apparent that the functions performed by the officer were wholly executive. The *Myers* case is also to be distinguished upon the ground that in that case Congress attempted to appropriate the power of removal by requiring the assent of the Senate to removals. Such a restriction is clearly to be distinguished from the statute here concerned in which the President has the exclusive power to remove in accordance with a standard enacted by Congress.

ARGUMENT.

I. Do the Provisions of Section 1 of the Federal Trade Commission Act, Stating that "Any Commissioner May Be Removed by the President for Inefficiency, Neglect of Duty, or Malfeasance in Office", Restrict or Limit the Power of the President to Remove a Commissioner Except Upon One or More of the Causes Named?[1]

A.

The Language of Section 1 of the Federal Trade Commission Act Clearly Restricts the President's Power to Remove Except for the Causes Stated.

In the court below the defendant asserted that the case of *Shurtleff v. United States*, 189 U. S. 311 (1903), conclusively established that the enumeration of causes for removal in Section 1 of the Federal Trade Commission Act was not intended by Congress to limit the power of the President to remove without cause stated and without a hearing. We desire at the outset to meet this contention. It is the position of the plaintiff that the *Shurtleff* case is clearly distinguishable on its facts and for that reason is not decisive of the question certified to this Court by the Court of Claims:

In the *Shurtleff* case Congress had created the office of General Appraiser of Merchandise by the 12th Section of the Act of Congress approved June 10, 1890, 26 Stat. 131, 136. The material portion of that section reads as follows:

> "Sec. 12. That there shall be appointed by the President, by and with the advice and consent of the Senate, nine general appraisers of merchandise, each of whom shall receive a salary of seven thousand dollars a year. Not more than five of such general appraisers shall be appointed from the same political party. They shall not be engaged in any other business, avocation, or em-

[1] For the purposes of this discussion it will be assumed that Congress has the power to provide that Federal Trade Commissioners should be removed for causes stated and for no other. (See pages 21 to 47, *ante*).

ployment, and may be removed from office at any time for inefficiency, neglect of duty, or malfeasance in office." (p. 313).

Shurtleff had been appointed a General Appraiser of Merchandise pursuant to the above section. The President subsequently removed him without assigning any cause for removal. Thereupon Shurtleff brought suit in the Court of Claims to recover salary accruing between the date of his removal and November 1, 1899. This Court, affirming the judgment of the Court of Claims dismissing plaintiff's petition, held that the 12th section of the Customs Administrative Act did not operate to deny to the President the right to remove for causes other than those stated.

In the *Shurtleff* case it was urged by the appellant that the rule of construction expressed in the maxim *expressio unius est exclusio alterius* should be applied to those provisions of the Customs Administrative Act which enumerated the causes for removal by the President. In rejecting that contention this Court stated:

"* * * Did Congress by the use of language providing for removal for certain causes thereby provide that the right could only be exercised in the specified causes? If so, see what a difference in the tenure of office is effected as to this office, from that existing generally in this country. The tenure of the judicial officers of the United States is provided for by the Constitution, but with that exception no civil officer has ever held office by a life tenure since the foundation of the government. Even judges of the territorial courts may be removed by the President. *McAllister v. United States*, 141 U. S. 174. To construe the statute as contended for by appellant is to give an appraiser of merchandise the right to hold that office during his life or until he shall be found guilty of some act specified in the statute. If this be true, a complete revolution in the general tenure of office is effected, by implication, with regard to this particular office. We think it quite inadmissible to attribute an intention on the part of Congress to make such an extraordinary change in the

usual rule governing the tenure of office, and one which is to be applied to this particular office only, without stating such intention in plain and explicit language, instead of leaving it to be implied from doubtful inferences. The rule which is expressed in the maxim is a very proper one and founded upon justifiable reasoning in many instances, but should not be accorded controlling weight when to do so would involve the alteration of the universal practice of the government for over a century and the consequent curtailment of the powers of the executive in such an unusual manner. We can see no reason for such action by Congress with reference to this office or the duties connected with it." (pp. 316, 317).

* * * * * * * * *

"It may be, perhaps, that the suggestion above indicated, of the purpose of the statute as evidenced by this language is not entirely satisfactory as a reason for its employment. We by no means overlook the objections to it. But we are called upon to place a meaning upon language which, as used in this section of the statute, gives rise to doubts as to what its true meaning is. We are asked not alone to interpret the language actually used, but to infer or imply therefrom a further meaning as to its effect, which does not necessarily flow from the language itself, and, if adopted, results in the creation of a tenure of this particular office, not attached to a single other civil office in the government, with the exception of judges of the courts of the United States. We cannot bring ourselves to the belief that Congress ever intended this result while omitting to use language which would put that intention beyond doubt. * * *" (p. 318).

The *Shurtleff* case therefore represents a departure from the rule of construction expressed in the maxim *expressio unius est exclusio alterius*. As stated by this Court, "The rule * * * is a very proper one * * * but should not be accorded controlling weight when to do so would involve the alteration of the universal practice of the government for over a century. * * *"

It is obvious that the reasoning upon which the *Shurtleff* decision rests has no application to a statute in which the tenure of office is limited to a term of years. There is far greater reason for circumscribing the tenancy of an office for life than one for a short term of years. Under the statute involved in this case the incumbent does not "hold office during his life or until he shall be found guilty of some act specified in the statute." On the contrary he holds office only during the term of years which the Congress has specified. In such a case it would seem reasonable to assume that the language used by Congress was intended to mean what it plainly says, namely: that the incumbent should hold office during the term of years for which he was appointed unless he shall be found guilty of an act specified in the statute as a cause for removal.

A comparison of Section 1 of the Federal Trade Commission Act with the Statute considered in the *Shurtleff* case demonstrates that Section 1 of the Federal Trade Commission Act was intended to restrict the power of the President to remove a Commissioner except for the causes stated. Section 1 of the Federal Trade Commission Act provides:

> "That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners' who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage

in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the Commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

"The commission shall have an official seal, which shall be judicially noticed."

This language clearly shows that Congress intended to limit the power of the President to remove a Federal Trade Commissioner except for the causes stated. Unlike the provisions of the Custom's Administrative Act, the term of office of a Federal Trade Commissioner is definitely set out in the section. Moreover, Congress has specifically provided that each commissioner *"shall continue in office"* for the term specified. No such description of the tenure was contained in the Custom's Administrative Act. The power of the President to remove must be read in connection with the express declaration that a commissioner *"shall continue in office"* for his term. This language makes clear that the subsequent enumeration of *causes* for removal was intended to restrict the power of the President to remove except for the causes stated.

The purpose of the Federal Trade Commission Act as expressed in Section 1 is wholly inconsistent with an unrestricted power of removal in the President. In the recent case of *Federal Trade Commission v. Keppel & Bro.*, 291 U. S. 301, 314 (1934), this Court expressly recognized that the Federal Trade Commission "was created with the avowed purpose of lodging the administrative functions committed to it in 'a body specially competent to deal with them by reason of information, experience, and careful study of the business and economic conditions of the industry affected,' and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would 'give to them an opportunity to acquire the expertness in dealing with these special questions

concerning industry that comes from experience'." The power of the President to remove at will a Federal Trade Commissioner is subversive of this declared purpose of Section 1 of the Federal Trade Commission Act. By removing all commissioners the President could defeat the intention of Congress to have at all times a body of experienced men. We submit that in the absence of clear and unmistakable language Congress should not be presumed to have intended that the President should have the power to defeat an "avowed purpose" of the Federal Trade Commission Act.

Unless Section 1 is construed as limiting the President's power of removal except for the causes stated the legislature is charged with using language which has no purpose or effect. If it be held that the President may remove for trivial or political reasons or for no real cause whatsoever the section fulfills no useful function because without the words "inefficiency, neglect of duty or malfeasance in office" the President has an unlimited power of removal and with them he still has the same power.[4]

The Court in the *Shurtleff* case was dealing with an officer whose duties were wholly executive in character. The Court was, therefore, reluctant to imply an intention on the part of Congress to limit the power of the Chief Executive, the President, over his *inferior* executive agent. But the Federal Trade Commission is not essentially an executive agent. It is an independent administrative body having quasi judicial and quasi legislative functions. (See pp. 41 to 47, *ante*). For that reason it would seem proper to presume that Congress intended to protect it from the arbitrary control of the President through the exercise of an unrestricted power of removal. And under the usual rules of construction the enumeration in the statute of

[4] If an officer is removed by the President for a cause designated by statute he is entitled to notice and hearing. See *Reagan v. United States*, 182 U. S. 419, 425 (1901). There is, however, no suggestion in the legislative history of the Federal Trade Commission Act that the enumeration of causes for removal under Section 1 was intended to achieve this purpose.

specific causes for removal implies an intention on the part of Congress to authorize removals for no other cause.

The rule of construction is well established by this Court that where a statute authorizes the performance of certain things in a particular manner it implies that it shall not be done otherwise.[8] The mere enumeration of causes for removal in Section 1 of the Federal Trade Commission Act therefore raises a presumption that Congress intended to limit the power of the President to remove except for the causes stated. In the case at bar the usual presumption is greatly strengthened by the provision in the Federal Trade Commission Act that a commissioner "shall continue in office" during his term. This Court treated the *Shurtleff* case as an exception to this general rule because of its peculiar facts.

Without exception, textbooks and State decisions hold that where a statute provides that an officer may be removed by the Executive for specified cause the Executive has no power to remove him for any other cause.

Mecham, in his Treatise, on *Public Offices and Officers*, declares:

> "So it is frequently provided that the executive shall remove only for a specified cause or 'for cause' generally. Where the cause is thus specified, it amounts to a prohibition to a removal for a different cause." (p. 285).

See also: Throop, *A Treatise on the Law Relating to Public Officers.*

McDowell v. Burnett, 92 S. C. 469; 75 S. E. 873 (1912), was a mandamus action to compel the payment of salary. The action was brought by a magistrate who had been appointed to office for a definite term of years. It appeared

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[8] *Paso Robles Mercantile Co. v. Commissioner*, 33 F. (2d) 653 (1929); *Johnson v. Southern Pacific Co.*, 117 Fed. 462 (1902); *Bend v. Hoyt*, 13 Peters 263 (1839); *Raleigh & G. R. Co. v. Reid*, 13 Wallace 269 (1871); *Smith v. Stevens*, 10 Wallace 321 (1870); *United States v. Barnes*, 222 U. S. 513 (1912).

that the Governor had removed the plaintiff from office under a statute which provided that the Governor might remove with the advice and consent of the Senate or might suspend a magistrate for incapacity, misconduct or neglect of duty and thereafter report such suspension together with the cause thereof to the Senate at its next session. It was urged upon the Court that the action of the Governor was justified as an exercise of the power to suspend appointive officers. In rejecting this contention the Court stated:

> "* * * But under a statute like this, conferring on the Governor the power to suspend a magistrate, for incapacity, misconduct or neglect of duty, suspension implies that the Governor has by careful investigation ascertained the fact that the officer is incapable, or has been guilty of misconduct or neglect of duty." (p. 485).

In *Dullam v. Willson*, 53 Mich. 392; 19 N. W. 112 (1884), it appeared that the Governor had removed the Trustee of an asylum for misconduct and neglect of duty. The trustee was an officer appointed by the Governor for a term of six years. The Constitution of the state provided that the Governor could remove officers for gross neglect of duty, corrupt conduct in office or misfeasance or malfeasance therein. It appeared that no notice and hearing was given to the trustee and no fact stated upon which the charge of malfeasance was based. In holding this removal void, the court declared:

> "It will be observed that the section of the Constitution under consideration only authorizes the Governor to remove for specified causes. He is not authorized to exercise the power at his pleasure or caprice. It is only when the causes named exist that the power conferred can be exercised. * * *" (p. 400).

In *People ex rel. Peck v. Commissioners*, 106 N. Y. 64 (1887), the Brooklyn Charter Act specified the causes for which a member of the Fire Department could be removed

by the Commissioners. It appeared that the plaintiff had been removed by the Commissioners without cause, notice, or hearing. In holding the removal void, the Court of Appeals held:

> "This section standing alone specified the cases in which, and the causes for which, dismissals may be made, and the plain implication is that they cannot be made in any other cases or for any other causes. The Latin phrase *expressio unius exclusio alterius* furnishes the rule of construction which must be applied. By well settled rules applicable to such cases before there can be any conviction under this section the member proceeded against is entitled to notice of the charge made against him and to a hearing and trial. It would, therefore, be quite absurd to hold that a worthy and competent member of the department, who was guilty of no offense or delinquency of any kind, could be arbitrarily dismissed without a charge, hearing or trial, but that a member guilty of some of the offenses or delinquencies mentioned could be dismissed only after a trial and conviction." (p. 68).

See also:

State ex rel. Martin v. Burnquist, 141 Minn. 308; 170 N. W. 201 (1918);
Commonwealth ex rel. Attorney General v. Benn, 284 Pa. 421, 131 Atl. 253 (1925);
State ex rel. Attorney General v. Hoglan, et al., 64 Ohio State 532 (1901);
Bryan v. Landis, Atty. Gen., ex rel. Reeve, 142 So. 650 (1932);
People ex rel. The Mayor v. Nichols, 79 N. Y. 582 (1880);
State ex rel. Fletcher, Atty. Gen. v. Naumann, 213 Ia. 418; 239 N. W. 93, (1931);
In re Diehl, 47 Ohio App. 17, 189 N. E. 855 (1933);
Village of Kendrick v. Nelson, 13 Idaho 244, 89 Pac. 755 (1907);
State ex rel. Denison v. City of St. Louis, 90 Mo. 19; 1 S. W. 757 (1886).

We submit that Section 1 of the Federal Trade Commission Act shows that Congress intended to create the Federal Trade Commission as an independent, non-partisan, administrative agent, free from the domination of the President through the exercise of an unlimited power of removal. Congress evidenced its intention by enumerating those causes for which a Federal Trade Commissioner might be removed. The intention of Congress to authorize removals for causes stated and for no other is carried out if the normal rules of statutory construction expressed in the maxim *expressio unius est exclusio alterius* are followed.

The answer to the first question certified to the Court should, we respectfully submit, be "Yes."

B.

The Legislative History of the Federal Trade Commission Act Indicates that Congress Intended to Restrict the Power of the President to Remove a Federal Trade Commissioner Except for the Causes Stated.

We are appending hereto as "Appendix A" an analysis of the legislative history of the Federal Trade Commission Act.[6]

An examination of the reports of committees and of the debates has failed to disclose any mention of the *Shurtleff* case, *supra*. It therefore seems reasonable to assume that Congress did not have before it the decision of this Court in the *Shurtleff* case construing the phrase providing that a general appraiser of merchandise "may be removed at any time by the President for inefficiency, neglect of duty or malfeasance in office." In any event the language used in Section 1 of the Federal Trade Commission Act is not

[6] This Court has repeatedly held that where a statute is ambiguous resort may be had to Committee Reports and to statements made by members of Congress in charge of the Bill as an aid in determining the true meaning of the statute. See *Duplex v. Deering*, 254 U. S. 443 (1921); *United States v. Great Northern Ry.*, 287 U. S. 144 (1932); *Wisconsin R. R. Comm. v. C. B. & Q. R. R. Co.*, 257 U. S. 563 (1922).

identical with that employed by Congress in the Customs Administrative Act. Moreover, this Court has repeatedly pointed out "that the same phrase may have different meanings in different connections." *American Security & Trust Co. v. Commissioner*, 224 U. S. 491, 494 (1912); *Lamar v. United States*, 240 U. S. 60 (1916); *People of Porto Rico v. Rosaly*, 227 U. S. 270 (1913).

The Committee Reports and the statements of those in charge of the Bill in Congress show that Congress intended to limit and restrict the power of removal except for the causes stated in the statute. In this regard we believe it is significant that in the protracted debates in Congress no one expressed the view that the President could remove a Commissioner without cause stated.

The following excerpts from the debates and from Committee Reports typify the attitude of Congress.[7]

In describing the nature of the Commission, the Hon. Senator Newlands, Chairman of the Committee on Interstate Commerce in the Senate, stated:[8]

> "The first question is: Shall an interstate trade commission of some kind be organized? I imagine that there can hardly be any difference of opinion on the point that there should be an administrative tribunal of high character, nonpartisan, or, rather, bipartisan, *and independent of any department of the Government.* I assume also that there should be a commission rather than one executive official, because there are powers of judgment and powers of discretion to be exercised. The organization should be quasi judicial in character. We want tradition; we want a fixed policy; we want trained experts; we want precedents; we want a body of administrative law built up. This cannot be well done by the single occupant of an office, subject to constant changes in its incumbency, and *subject to higher executive authority.* Such work must be done by a

[7] For a more thorough digest see Appendix A, page 48.

[8] These remarks were incorporated in the Report of the Committee on Interstate Commerce of the Senate accompanying H. R. 15613 and S. 4160. Senate Report 597, 63rd Congress, 2d Session.

board or commission of dignity, permanence, and ability, independent of executive authority except in its selection, and independent in character. (Cong. Rec. Vol. 51, pt. 11, p. 11092). (Italics supplied).

* * * * * * * *

"One of the chief advantages of the proposed commission over the Bureau of Corporations lies in the fact that it will have greater prestige and independence, and its decisions coming from a board of several persons, will be more readily accepted as impartial and well considered. For this reason also it is essential that it should not be open to the suspicion of partisan direction, and this bill provides, therefore, that not more than three members of the commission shall belong to any one political party." (p. 11089).

In contrasting the effectiveness of an independent administrative body with the office of Attorney General, Senator Newlands stated:

"We have found in the Interstate Commerce Commission a nonpartisan organization, which moves absolutely free from the influence either of Congress or of the President, an independent organization charged with the enforcement of the interstate commerce act, and commencing that enforcement at the same time that the Attorney General started in upon the enforcement of the Sherman antitrust law. We find, however, by way of contrast that almost every transportation question has been settled, whilst we are just upon the threshold of the adjustment of the trust question; and meanwhile even the prevention of the creation of these great aggregations has not been accomplished. We have not only failed to destroy those which were in existence when the act was created, but we have failed to prevent the organization of others." (Cong. Rec. Vol. 51, pt. 11, p. 11235).

In answering the criticism that the Commission would not be subject to the control of the President, Representative Willis, from Ohio, a member of the House Interstate and Foreign Commerce Committee, stated in the House:

"The bill is criticized because, under its terms, it is proposed that this Commission shall not be subject to the Commissioner of Corporations or to the head of the Department of Commerce, or even to the President. The bill is criticized because the authors of it have made an attempt to make this commission an independent body, responsible only to the American people. I am frank to say that, in my judgment, that is one of the reasons why this bill is to be commended —because it contemplates the creation of a commission that shall not be subject to anybody in the Government, but shall be subject only to the people of the United States. I hope and believe that if this bill shall be enacted into law it will not be possible to have such a situation as to corporate control and political management as we find at present." (Cong. Rec. Vol. 51, pt. 9, p. 8981).

Representative Covington, the Chairman of the Sub-Committee on Interstate and Foreign Commerce in the House, in Report No. 533, accompanying H. R. 15613, stated:

"But the great value to the American people of the Interstate Commerce Commission has been largely because of its independent power and authority. The dignity of the proposed commission and the respect in which its performance of its duties will be held by the people will also be largely because of its independent power and authority. Therefore the bill removes entirely from the control of the President and the Secretary of Commerce the investigations conducted and the information acquired by the commission under the authority heretofore exercised by the Bureau of Corporations or the Commissioner of Corporations. All such investigations may hereafter be made upon the initiative of the commission, and the information obtained may be made public entirely at the discretion of the commission." (Cong. Rec. Vol. 51, pt. 9, p. 8842).

We submit that Congress intended to create the Federal Trade Commission as a nonpartisan body, independent of

the President, and absolutely free from domination by him. A Federal Trade Commissioner cannot be said to be free from the domination of the President if removable at the President's will, without cause or hearing.

II. If the Power of the President to Remove a Commissioner is Restricted or Limited as Shown by the Foregoing Interrogatory and the Answer Made Thereto, is Such a Restriction or Limitation Valid Under the Constitution of the United States?

A.

Whether the President has an Unqualified Power of Removal is Dependent Upon the Nature and Function of the Office Involved and Where the Officer Performs Quasi Legislative or Quasi Judicial Functions the Congress Constitutionally may enact a Reasonable Legislative Standard to be Followed by the President in the Exercise of his Power of Removal.

1. The Rule of the *Myers* Case is Only Applicable to Purely Executive Officers.

In the court below the defendant asserted that the case of *Myers v. United States*, 272 U. S. 52 (1926), conclusively holds that under the Constitution Congress may not limit the President's power of removal by requiring by statute that a Federal Trade Commissioner may be removed for inefficiency, neglect of duty, or malfeasance in office, and for no other cause.

In the *Myers* case the President, by and with the advice and consent of the Senate, had appointed the appellant a Postmaster of the first class for a term of four years. The 6th section of the Act of Congress of July 12, 1876, 19 Stat. 80, 81, c. 179, under which Myers had been appointed, provided that:

"Postmasters of the first, second and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law."

The President, ignoring this provision, removed Myers from office without the advice and consent of the Senate. Myers brought suit in the Court of Claims to recover the amount of his salary from the date of removal to the end of his term.

The precise question passed upon in the *Myers* case was not, as suggested by the defendant, whether Congress might prescribe a reasonable standard for the removal of all inferior officers but as stated by the Chief Justice in his opinion:

"* * * whether under the Constitution the President has the *exclusive power of removing executive officers of the United States* whom he has appointed by and with the advise and consent of the Senate." (*Myers v. United States, supra*, page 106, italics supplied).

The Court held that Myers had been duly removed since the President is empowered by the Constitution to remove any executive officer appointed by him by and with the advice and consent of the Senate, and that this power is not subject in its exercise to the assent of the Senate nor can it be made so by Act of Congress.

It is a fundamental principle of our constitutional government that one of the separate departments of government shall not usurp powers committeed by the Constitution to another department. *Mugler v. Kansas*, 120 U. S. 623 (1877).* We submit that the unqualified power of removal held to exist in the *Myers* case was necessary to pro-

* See The Federalist, Nos. 47 to 51; *Panama Refining Co. v. Ryan*, 293 U. S. —— 79 L. Ed. 223 (1935).

tect the executive branch of the government in its power to control through the power of removal officers exercising executive functions. It has no application to a Federal Trade Commissioner who performs functions as an agent not only of the executive but also of the legislature and the courts.[19] The possession by the President of an unqualified power to remove officers who act as agents of the legislature or who perform quasi legislative functions is subversive of the fundamental doctrine of the division of powers

[19] In *Springer v. Government of Philippine Islands*, 277 U. S. 189 (1928), there was involved the validity of Philippine legislation which created a national coal company and a national bank as corporations under legislative authority of the Philippine Islands and further provided that the voting power of all stock owned by the Government of the Philippine Islands in such corporations should be vested in a committee or board comprised of the Governor General, the President of the Senate, and the Speaker of the House of Representatives of the Philippine Islands. The constitutional validity of the legislation was attacked by the Executive branch of the Philippine Government. Attorney General Mitchell, then Solicitor General for the United States, representing the Executive branch of the Philippine Government before the Supreme Court of the United States, recognized in his brief the applicability of the Myers doctrine only to appointments and removals of officers exercising executive functions. He there said:

> "The Legislature no doubt may make appointments to legislative positions, and it is equally clear that it may not make appointments to executive offices or posts. To determine in this case whether the act of making an appointment to a position on the Board of Control or Committee is in itself an executive function requires a decision as to whether the functions of the members are executive or legislative. If they are executive, then the point made in paragraph I of this brief (namely, that the voting of the shares and direction of the corporation's affairs incident to the voting power are executive functions, of which, under the Organic Act, the Legislature may not deprive the Governor General) is sound and it is unnecessary to go further. If the functions of these positions are legislative in character, then there is nothing to our contention that the Governor General has been deprived of any power that belongs to him in the control of these corporations, and it is equally clear that the act of appointment to places on the Board and Committee is not beyond the legislative authority." (P. 47).

The majority of the Supreme Court found that the functions exercised by the two corporations were executive functions and that, therefore, the vesting in the Legislature of powers to participate in the election of the directors was unconstitutional. The distinction recognized by the then Solicitor General was not commented upon by the court. It is submitted, however, that it is a proper distinction and that the *Myers* case doctrine is confined to the protection of the Executive branch of the Government in its power to remove officers exercising executive functions.

between the executive, legislative and judicial branches of our Government.[11]

The power of the President to remove officers of the United States is not specifically mentioned by the Constitution. It has been held that such a power is implied from Article II, Sections 1 (1), 2 (2) and 3.[12] The pertinent parts of these sections read as follows:

Section 1 (1)

> "The executive Power shall be vested in a President of the United States of America. • • •"

Section 2 (2)

> "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone,

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[11] Certain statements in the *Myers* case suggest that any limitation upon the President's power to remove any officer is violative of the Constitution. These statements are *dicta*. It is submitted that Mr. Chief Justice Taft's quotation from Mr. Chief Justice Marshall's statement is apt. Mr. Chief Justice Taft said:

> "In such a case we may well recur to the Chief Justice's own language in *Cohens v. Virginia*, 6 Wheat. 264, 399, in which, in declining to yield to the force of his previous language in *Marbury v. Madison*, which was unnecessary to the judgment in that case and was *obiter dictum*, he said:
>
> "'It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.'"

[12] *Myers v. United States*, 272 U. S. 52 (1926).

in the Courts of Law, or in the Heads of Departments."

Section 3

"* * * he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."

The extent of the power implied from these sections must be determined in the light of the power granted to Congress by the Constitution:

"All legislative Powers herein granted shall be vested in the Congress of the United States, * * *" (Article I, Section 1)

"The Congress shall have Power * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Power, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. * * *" (Article I, Section 8 (18).)

The possession by the President of the unrestricted power to remove an officer of the United States acting as an agent of the legislature or performing quasi legislative functions would, we submit, be utterly inconsistent with the provision contained in Article I, Section 1 of the Constitution which requires that "all legislative Powers * * * shall be vested in the Congress of the United States." The power to legislate includes the incidental power to make investigations in aid of legislation. *McGrain v. Daugherty*, 273 U. S. 135 (1927). It requires no citation of authority to demonstrate that the effectiveness of any officer making an investigation at the instance of Congress is largely dependent upon his freedom from arbitrary interference by the President or the Courts. The mere possession of a power to remove such an officer, without notice and hearing and for no stated cause, would vest in the President the power to destroy the independence of such officer or even to

prevent his acting as an agent of Congress. The power to remove an officer is the power to dominate him. The exercise of this power might therefore hamper if not defeat any attempt by Congress to utilize an officer of the United States as a fact finding agency in aid of legislation. It is submitted that an agency of the legislature should be free from the domination of the President through the exercise of an *arbitrary* power of removal. In such a case the function of the office suggests the test to be applied in determining whether and to what extent Congress may enact legislative standards of removal to be followed by the President.

2. Enactment of Standards of Removal is Essentially Different from Requiring the Senate's Consent to Removals.

There is a further reason why the *Myers* case is not controlling here. In that case the Court held that Congress could not require the assent of the Senate to the removal of postmasters of the first class.

The plaintiff in this case concedes that under the Constitution "The President has the *exclusive power of removing executive officers* of the United States whom he has appointed by and with the advice and consent of the Senate." Since the power to remove such an officer has been granted to the President by the Constitution, the Congress has no authority to *appropriate* that power by requiring its assent to removals. However, the attempt by the legislature (in the statute construed in the *Myers* case) to appropriate the executive power of removal is entirely different from the action of the Congress in prescribing a legislative standard in accordance with which removals are to be made exclusively by the President. Furthermore, it must be remembered that the officer with whom the case at bar is concerned is a Federal Trade Commissioner, whose functions are quasi judicial and quasi legislative. But let us grant, for the moment, that the President has the exclusive right to

remove from office even a member of such an independent commission. The Statute which created this commission and under which the decedent was appointed, lays down a legislative standard to be applied by the President in the exercise of his power of removal. The removal of an executive officer is an executive action which the legislature may not appropriate by requiring its assent. But even in such a case "to prescribe the conditions under which this may be done is legislative." (272 U. S. 52, 186). Since the legislature does not appropriate his power to remove *executive* officers by prescribing conditions of removal, *a fortiori* the Congress appropriates no executive power in prescribing the sole conditions for the removal of a member of the Federal Trade Commission.

This distinction has been recognized by counsel appearing for the United States. In his argument in the *Myers* case the Solicitor General of the United States, Mr. Beck, clearly distinguished the attempt of Congress in the *Myers* case to *appropriate* to the Senate the Executive's power of removal from a statute creating legislative standards of public service, "which have a legitimate relation to the nature and scope of the office, and the qualification of the incumbent." He stated,—

> "It is not necessary in this case to determine the full question as to this power of removal. This court can say that this particular Act is unconstitutional, without denying to the Congress the power to create legislative standards of public service, which have a legitimate relation to the nature and scope of the office, and the qualifications of the incumbent.
>
> " • • • For this law differs, *toto caelo*, from a law which prescribes a standard of service. It declares no public policy with respect to any attribute of an office. There is no legislative standard of efficiency; it is a mere redistribution of power—a giving to one branch of Congress some of the power which belongs to the President." (272 U. S. 90).

Obviously under the provision of the Constitution granting to the Congress "power to make all laws which shall be necessary and proper * * *" the Congress may not, by legislation, appropriate powers given to another branch of our Government, or enact legislation in conflict with other provisions of the Constitution. Thus, where the Constitution gives the power of appointment exclusively to the President by and with the consent of the Senate, the Congress may not appropriate the power of appointment to itself or give it to some agency other than the President. But this does not mean that the President has an unlimited and unrestricted power of appointment. Under the "necessary and proper" clause of the Constitution, Congress has repeatedly undertaken to limit the President's freedom of choice in making nominations for executive offices and thus in many cases may have prevented the President from selecting the person deemed by him best fitted for the office. As pointed out in the dissenting opinion of Justice Brandeis in the *Myers* case *supra*, "Congress has, from time to time, restricted the President's selection by the requirement of citizenship. It has limited the power of nomination by providing that the office may be held only by a resident of the United States; of a State; of a particular State; of a territory; of the District of Columbia; of a particular foreign country. It has limited the power of nomination further by prescribing specific professional attainments, or occupational experience. It has, in other cases, prescribed the test of examination. It has imposed the requirement of age; of sex; of race; of property; and of habitual temperance in the use of intoxicating liquors. Congress has imposed like restrictions on the power of nomination by requiring political representation; or that the selection be made on a nonpartisan basis. It has required in some cases, that the representation be industrial; in others, that it be geographic. It has at times required that the President's nominees be taken from, or include repre-

sentatives from, particular branches or departments of the Government. By still other statutes, Congress has confined the President's selection to a small number of persons to be named by others."[13] It is significant that the restrictions thus placed upon the power of appointment usually bore a direct relationship to the function of the office involved.

These laws were signed by the President. The enactment of a legislative standard to be met by appointees of the President has therefore been regarded both by Congress and the President as a legislative and not an executive function, and this is true in spite of the fact such legislation restricts the freedom of the President to appoint.

Unlike the power of appointment the power of removal is not expressly conferred upon the President by the Constitution of the United States. The possession of this power by the President is implied as an incident to the power of appointment and to the executive power of the President. The power of removal like the power of appointment is thus granted to the President of the United States by the Constitution. It is clear that Congress may not appropriate to itself either the power to appoint or the power to remove. But like the power of appointment the power of removal is not unlimited in all respects. Just as Congress may classify the persons from whom appointments shall be made, so it would seem that it has the power under the "necessary and proper" clause to enact a legislative standard to be followed by the President in the exercise of his power to remove an officer of the United States. And Congress has repeatedly exercised this power by requiring that officers may be removed only for causes enumerated by statute.[14]

We are not urging, however, that in prescribing standards for the removal of Federal officers the power of Con-

[13] For an enumeration of such statutes see footnotes at pages 265-274 of the dissenting opinion of Justice Brandeis in the *Myers* case, *supra*.

[14] For an enumeration of such statutes see *Myers v. United States*, 272 U. S. 262, 263.

gress is in this respect an unlimited one. The extent of the power of Congress depends upon the nature of the office with which the statute deals. Heads of departments composing the President's cabinet occupy an advisory capacity in relation to the President which is political in nature and which would seem to render these officers inherently subject to an unqualified power of removal in the President. But where the office is one which from its nature reasonably requires that the officer be secure or that his removal be for good cause only then, we submit, Congress may impose reasonable limitations upon the President's power of removal.

3. The Decision of 1789.

In the *Myers* case, *supra*, this Court reviewed at length the debates in the First Congress in connection with the "Decision of 1789." It found that those debates and that decision constituted a declaration by the Congress that the President and not the legislature had the power to remove an executive officer. We submit that a further examination of those debates will disclose that the extent to which Congress may restrict the President's power to remove other than purely executive officers is dependent upon the nature and function of the office involved.

On June 16, 1789 the House considered a bill proposed by Mr. Madison to establish an executive department, to be known as the "Department of Foreign Affairs." The bill as first introduced provided that the officer there provided for was "to be removable from office by the President of the United States." It was objected that this phrase implied an attempt by Congress to confer a power upon the President, which he already possessed. Mr. Benson then offered an amendment to substitute the phrase; "whenever the said principal officer shall be removed from office by the President of the United States." The amend-

ment was adopted and the bill passed. The Senate subsequently passed the bill without change.[15]

The debates in Congress dealing with this amendment disclose that the sponsors of the bill believed the controlling factor to be the executive nature of the office. With respect to such an executive office it was their view that the President and not the Congress had the power of removal.

Mr. Sedgwick said:

"* * * If expediency is at all to be considered, gentlemen will perceive that this man is as much an instrument in the hands of the President, as the pen is the

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[15] Of the proceedings in the Senate there is no complete record. The vote on the passage of the bill was a tie, the deciding vote was cast by the Vice President, John Adams.

Of the proceedings in the House of Representatives Senator Edmonds made the following analysis (III Impeachment of Andrew Johnson, pp. 84, 85):

"Of the 54 Members of the House of Representatives present, those who argued that the power of removal was, by the Constitution, in the President, were Sedgwick, Madison (who had maintained the opposite), Vining, Boudinot, Clymer, Benson, Scott, Goodhue, and Baldwin. Those who contended that the President had not the power, but that it might be conferred by law, but ought not to be, were Jackson, Stone, and Tucker.

"Those who believe that the President had not the power, and that it could not be conferred, were White, Smith of South Carolina, Livermore, and Page.

"Those who maintained that the President had not the inherent power, but that it might be bestowed by law, and that it was expedient to bestow it, were Huntington, Madison at first, Gerry, Ames, Hartly, Lawrence, Sherman, Lee and Sylvester—24 in all, speaking. Of these, 15 thought the Constitution did not confer this power upon the President, while only 9 thought otherwise. But those who thought he had the power and those who thought the law ought to confer it were 17.

"Thirty did not speak at all, and in voting upon the words conferring or recognizing the power, they were just as likely to vote upon the grounds of Roger Sherman as upon the reasons of those who merely intended to admit the power. On the motion to strike out the words 'to be removable by the President,' the ayes were 20, and the noes 34; but no guess, even, can be formed that this majority took one view rather than the other. Indeed, adding only the 8 who spoke against the inherent power, but for the provisions of law, to the 20 opponents of both, and there is a clear majority adverse to any such inherent power in the President. And when on the next day it was proposed to change the language to that which became the law, among the ayes are the names of White, Smith of South Carolina, Livermore, Page, Huntington, Gerry, Ames and Sherman, all of whom, as we have seen, were of opinion against the claim of an inherent power of removal in the President."

See also Corwin—The President's Removal Power, pp. 12-13.

instrument of the Secretary in corresponding with foreign Courts. If, then, the Secretary of Foreign Affairs is the mere instrument of the President, one would suppose, on the principle of expediency, this officer should be dependent upon him. It would seem incongruous and absurd, that an officer who, in the reason and nature of things, is dependent on his principal, and appointed merely to execute such business as is committed to the charge of his superior, (for this business, I contend, is committed solely to his charge,) I say it would be absurd, in the highest degree, to continue such a person in office contrary to the will of the President, who is responsible that the business be conducted with propriety, and for the general interest of the nation." (1 Annals of Congress, Col. 522),[16].

Mr. Boudinot said:

"If we were not at liberty to modify the principles of the Constitution, I do not see how we could erect an Office of Foreign Affairs. If we establish an office avowedly to aid the President, we leave the conduct of it to his discretion. Hence the whole Executive is to be left with him. Agreeably to this maxim, all Executive power shall be vested in a President. But how does this comport with the true interest of the United States? Let me ask gentlemen where they suspect danger? Is it not made expressly the duty of the Secretary of Foreign Affairs to obey such orders as shall be given to him by the President? And would you keep in office a man who should refuse or neglect to do the duties assigned him? Is not the President responsible for the Administration? He certainly is. How then can the public interest suffer?" (1 Annals of Congress, Col. 528).

Mr. Benson, author of the amendment, said:

"* * * I will instance the officer to which the bill relates. To him will necessarily be committed nego-

[16] When *Annals of Congress* are referred to, reference is made to those compiled by Joseph Gales, Edition of 1834. There appears to be some discrepancy in the column numbering in the various compilations.

tiations with the Ministers of foreign Courts. This is a very delicate trust. The supreme Executive officer, in superintending this department, may be entangled with suspicions of a very delicate nature, relative to the transactions of the officer, and such as from circumstances would be injurious to name * * *." (1 Annals of Congress, Col. 505).

Mr. Vining, a strong supporter of the amendment, said:

"As to the principle of the gentleman from Virginia, (Mr. White,) that he who appoints must remove. It may be a good one, but it is not a general one. Under this Government, officers appointed by the people are removed by the representatives of the State Legislatures. I take it that the best principle is, that he who is responsible for the conduct of the officer, ought to have the power of removing him; by adhering to this principle, we shall be led to make a right decision on the point in debate." (1 Annals of Congress, Col. 465).

and further—

"The argument of convenience is strong in favor of the President; for this man is an arm or an eye to him; he sees and writes his secret dispatches, he is an instrument over which the President ought to have a complete command."

"* * * The Departments of Foreign Affairs and War are peculiarly within the powers of the President, and he must be responsible for them; but take away his controlling power, and upon what principle do you require his responsibility? (1 Annals of Congress, Cols. 511 to 512).

Mr. Hartley said:

"* * * but first I would observe that this is an office of considerable importance, if we are to judge by the duties assigned in the body of the bill. In all commercial countries it will require men of high talents to fill such an office, and great responsibility. It is necessary

to connect the business in such a manner as to give the President of the United States a complete command over it; so, in whatever hands it is placed, or however modulated, it must be subjected to his inspection and control." (1 Annals of Congress, Cols. 479-480).

Mr. Lawrence said:

"In the Constitution, the heads of the departments are considered as the mere assistants of the President, in the performance of his Executive duties." (1 Annals of Congress, Col. 485).

In the *Myers* case this Court referred at length to the views of James Madison. While he believed that the President and not the Congress had the power to remove executive political officers it was also his view that an officer having quasi legislative or quasi judicial and executive powers was not subject to the unqualified control of the President through the exercise of the power of removal.

One week after the debates upon the Foreign Affairs Department Bill Mr. Madison clearly expressed his view that Congress might reasonably restrict the President's power to remove other than purely executive officers. In discussing the comptroller he declared:

"It will be necessary to consider the nature of this office, to enable us to come to a right decision on the subject; in analyzing its properties, we shall easily discover they are not purely of an Executive nature. It seems to me that they partake of a Judiciary quality as well as Executive; perhaps the latter obtains in the greatest degree. The principal duty seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens: This partakes strongly of the judicial character, and there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the Executive branch of the Government. I am inclined to think that we ought to consider him something in the light of an arbitrator between the public and individuals, and that he ought to hold his office by

such a tenure as will make him responsible to the public generally; then again it may be thought, on the other side, that some persons ought to be authorized on behalf of the individual, with the usual liberty of referring to a third person, in case of disagreement, which may throw some embarrassment in the way of the first idea.

"Whatever, Mr. Chairman, may be my opinion with respect to the tenure by which an Executive officer may hold his office according to the meaning of the Constitution, I am very well satisfied, that a modification by the Legislature may take place in such as partake of the judicial qualities, and that the legislative power is sufficient to establish this office on such a footing as to answer the purposes for which it is prescribed." (1 Annals of Congress, Col. 611-612).

Mr. Sedgwick disagreed with Mr. Madison as to the nature of the office of Comptroller. He said:

"He also conceived that a majority of the House had decided that all officers concerned in Executive business should depend upon the will of the President for their continuance in office; and with good reason, for they were the eyes and arms of the principal Magistrate, the instruments of execution." (1 Annals of Congress, Col. 613).

Mr. Madison in reply said:

"When I was up before, * * *, I endeavored to show that the nature of this office differed from the others upon which the House had decided; and, consequently, that a modification might take place, without interfering with the former distinction; so that it cannot be said we depart from the spirit of the Constitution.

"Several arguments were adduced to show the Executive Magistrate had Constitutionally a right to remove *subordinate* officers at pleasure. Among others it was urged, with some force, that these officers were merely to assist him in the performance of duties,

which, from the nature of man, he could not execute without them, although he had an unquestionable right to do them if he were able; but I question very much whether he can or ought to have any interference in the settling and adjusting the legal claims of individuals against the United States. The necessary examination and decision in such cases partake too much of the Judicial capacity to be blended with the Executive. I do not say the office is either Executive or Judicial; I think it rather distinct from both, though it partakes of each, and therefore some modification, accommodated to those circumstances, ought to take place. * * *" (1 Annals of Congress, Col. 614).

The Congress concluded that the Comptroller was an executive officer and it was perhaps for that reason that the suggestion of Mr. Madison was not carried out.

That the early Congresses shared Mr. Madison's belief that the President did not have the unrestricted power to remove other than executive political officers is shown, by their enactments.[17]

In view of the statements of the leaders in Congress as to the basis of the "Decision of 1789," we submit that Con-

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[17] Thus the Act of 1789 providing for the government of the Northwest Territory (1 Stat. 50, 53 (1789)), indicated that the commissions of judges in this territory should "continue in force during good behaviour." Acts following this containing the same provisions were those providing for the government of the territory south of the Ohio River (1790), for the organization of the territories of Indiana (1800), Michigan (1805) and Illinois (1809). It may be noted that territorial judges had executive and legislative powers as well as judicial powers.

Under the Act of Feb. 27, 1801, the Courts of the District of Columbia were established and this act provided that judges were "to hold their respective offices during good behaviour." In this same act it is provided that "such number of discreet persons to be justices of the peace as the President of the United States shall from time to time consider expedient to serve for a term of five years. (2 Stat., 103).

Subsequently the Act establishing the territorial government of Wisconsin (1836) directed that the judges "shall hold their offices during good behaviour." The organization Acts for the territories of Louisiana (1804), Iowa (1838), Minnesota (1849), New Mexico (1850), Utah (1850), North Dakota (1861), Nevada (1861), Colorado (1861), and Arizona (1863), provided for judges "to serve for four years." Those for the organization of Oregon (1848), Washington (1853), Kansas (1854), Nebraska (1854), Idaho (1863), Montana (1864), Alaska (1884), Indian Territory (1889), and Oklahoma (1890), provided for judges "to serve for four years, and until their successors shall be appointed and qualified."

gress decided solely the question of the power to remove *executive* officers. Those debates also clearly indicate that the sponsors of the bill recognized that, dependent upon the nature and function of the office involved, Congress might restrict within reasonable limits the power of the President to remove.

4. The Decisions of This Court.

The views of the early leaders of Congress that the extent of the President's power to remove officers of the United States was dependent upon the nature and function of the office involved is not inconsistent with any decisions of this Court.

In *Marbury v. Madison*, 1 Cranch, 137, 161 (1803), Chief Justice Marshall declared that Congress had properly exercised its power to prevent the President from removing a Justice of the Peace of the District of Columbia. In view of the function of the office involved the decision is not necessarily inconsistent with the holding in the *Myers* case. It would seem reasonable to protect a *quasi* judicial officer from removal during his term of office.

Matter of Hennen, 13 Peters, 230 (1839), was a case involving the right of the United States District Judge to remove from office the clerk of the District Court for the District of Louisiana. The right of the Judge to remove the clerk was upheld. The opinion suggests that in the case of a Clerk of the District Court the power of removal may be vested exclusively in the Courts. The opinion states:

> "• • • It would be a most extraordinary construction of the law, that all these offices were to be held during life, which must inevitably follow, unless the incumbent was removable at the discretion of the head of the department: *the President has certainly no power to remove.* These clerks fall under that class of inferior officers, the appointment of which the Constitution authorizes Congress to vest in the head of the department. • • •" (p. 260). (Italics supplied).

In *United States ex rel. Goodrich* v. *Guthrie*, 17 How. 284 (1855), the power of the President to remove territorial judges was argued but not decided. In the course of his dissenting opinion Mr. Justice McLean referred to the "Decision of 1789," as follows:

> "In the 2d section of the Act referred to it was provided: When the principal officer of the department should be removed the chief clerk, during the vacancy, shall have custody of the records of the department. And a similar provision is contained in the other acts to establish the principal departments of the government. The heads of these departments constituted the cabinet of the President; and, as they were not only his advisers, but discharged their duties under his direction, there was a peculiar propriety that their offices should be held at the will of the executive. (p. 306).
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> . . . . . .
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> "It is argued that, as the President is bound to see the laws faithfully executed, the power to remove unfaithful or incompetent officers is necessary. *This may be admitted to be a legitimate argument, as commonly applied to executive officers.* My own view is, that the power to see that the laws are faithfully executed, applies chiefly to the giving effect to the decisions of the courts when resisted by physical force. *But however strongly this may refer to the political officers of the government, how can it apply to the judicial office?* (p. 310).
>
> . . . . There have been, it is believed, but two judges of territories removed, and those recently, since the organization of the Union. And we may rely on the early practice of the government, to show its true theory, in the exercise of federal powers. The great principles of our system were then understood and adhered to, and our safest axioms are found in this part of our history." (p. 311). (Italics supplied).

See also:

McAllister v. *United States*, 141 U. S. 174 (1891).

In *United States* v. *Perkins*, 116 U. S. 483 (1886), a cadet engineer brought suit to recover his salary for the period after his removal from office by the Secretary of the Navy. Revised Statutes 1229 provided that no officer in the Naval service should be removed from service in time of peace except in pursuance of a sentence of court-martial. Although it was urged that the Secretary of the Navy was acting for the Executive this Court held that the cadet engineer had been improperly removed. The function of an officer of the Navy would seem to require that he be reasonably safe from arbitrary removal.

See also:

Blake v. *United States*, 103 U. S. 227 (1880);
Wallace v. *United States*, 257 U. S. 541 (1922).

In *Shurtleff* v. *United States*, 189 U. S. 311 (1903), this Court assumed that Congress might prescribe reasonable legislative standards for the removal from office of General Appraisers appointed by the President of the United States:

> "We assume for the purposes of this case only, that Congress could attach such conditions to the removal of an officer appointed under this statute as to it might seem proper, and therefore, that it could provide that the officer should only be removed for the causes stated and for no other, and after notice and an opportunity for a hearing. Has Congress by the twelfth section of the above act so provided?" (p. 314).

The mere recognition in the *Shurtleff* case of the power of Congress to require notice and hearing if removal were made for any of the causes specified was an express acknowledgment of the power of Congress within certain limits to prescribe legislative standards for the removal of officers. If the President's power in this respect were unlimited, it is clear

that he might remove for any cause and without notice or hearing. (See dissenting opinion of Justice McReynolds in the *Myers* case at page 178). The question of constitutionality would, therefore, seem to depend upon the reasonableness of the restriction imposed upon the President. In determining such a question the function of the office involved should be the controlling factor.

See also:

Reagan v. *United States*, 182 U. S. 419 (1901);
Embry v. *United States*, 100 U. S. 680 (1879);
McElratt v. *United States*, 102 U. S. 426 (1880).

In the *Myers* case, *supra*, this Court held that the Senate could not appropriate the power of the President to remove executive officers by requiring the assent of the Senate to the removal of a Postmaster of the first class. In view of the executive nature of the office involved the restriction there placed upon the power of the President to remove seems clearly unreasonable.

In many of the above cases this Court assumed that Congress might restrict the power of the President to remove officers of the United States. All such cases involved offices whose functions required that the incumbent be reasonably secure from arbitrary removal. In those cases (such as the *Myers* case, *supra*) in which the authority of Congress to restrict the President's power of removal was denied it was apparent that the functions performed by the officer were wholly executive. Like the Decision of 1789, the decisions of this Court therefore suggest that the power of Congress to enact reasonable legislative standards to be applied by the President in the exercise of his power of removal is dependent upon the nature and function of the office involved.

5. The Nature of the Federal Trade Commission.

The plaintiff now proposes to demonstrate that the function of the Federal Trade Commission requires that the Commissioners be reasonably secure from arbitrary removal.

Section 1 of the Act provides for the establishment of a Federal Trade Commission to be composed of five commissioners appointed by the President by and with the consent of the Senate. Each Commissioner is to serve for a definite term of years. In order that the Commission should be free from political domination it is provided that "Not more than three of the Commissioners shall be members of the same political party."

Section 5 of the Act empowers and directs the Federal Trade Commission to prevent persons, partnerships, etc., "from using unfair methods of competition in commerce." When acting under this Section the Commission has been held to be an administrative body. Thus in *Federal Trade Commission* v. *Eastman Kodak Co. et al.*, 274 U. S. 619 (1927), it was stated:

> "The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers. *National Harness, etc., Association* v. *Federal Trade Commission* (C. C. A.), 268 Fed. 705, 707; *Chamber of Commerce* v. *Federal Trade Commission* (C. C. A.), 280 Fed. 45, 48. It has not been delegated the authority of a court of equity."

The nature of the administrative functions delegated to the Federal Trade Commission was pointed out by the Circuit Court of Appeals for the Seventh Circuit in *Sears, Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 307 (1919). The Court there stated:

> "With the increasing complexity of human activities many situations arise where governmental control can be secured only by the 'board' or 'commission' form of legislation. In such instances Congress declares the

public policy, fixes the general principles that are to control, and charges an administrative body with the duty of ascertaining within particular fields from time to time the facts which bring into play the principles established by Congress. Though the action of the commission in finding the facts and declaring them to be specific offenses of the character embraced within the general definition by Congress may be deemed to be quasi legislative, it is so only in the sense that it converts the actual legislation from a static into a dynamic condition. But the converter is not the electricity. And though the action of the commission in ordering desistance may be counted quasi judicial on account of its form, with respect to power it is not judicial, because a judicial determination is only that which is embodied in a judgment or decree of a court and enforceable by execution or other writ of the court" (p. 312).

See also:

Royal Baking Powder Co. v. *Federal Trade Commission*, 281 Fed. 744 (1922);

Millers National Federation v. *Federal Trade Commission* (S. C. D. C.) Fed. Tr. Com. St. and Dec. 1914-1929, p. 554;

Federal Trade Commission v. *Gratz*, 253 U. S. 421 (1920).

The designation of an administrative agency has come to denote a distinct type of governmental body.[18] While the authority of such an agency is apt to be legislative in scope its method of procedure is modeled on judicial practice and indeed must be if the Constitutional principle against delegation of legislative power is to be obviated. *Wichita R. R.* v. *Public Utilities Commission*, 260 U. S. 48 (1922).

[18] In describing the nature of a proceeding before the Federal Trade Commission the Supreme Court stated in *Federal Trade Commission* v. *Gratz*, 253 U. S. (1920) 421, at page 432, "The proceeding is thus a novelty. It is a new device in administrative machinery, introduced by Congress in the year 1914, in the hope thereby of remedying conditions in business which a great majority of the American people regarded as menacing the general welfare, and which for more than a generation they had vainly attempted to remedy by the ordinary processes of law."

But the Commission has powers other than the administrative powers enumerated in Section 5.

Section 7 of the Act provides that "in any suit in equity brought by or under the direction of the Attorney General as provided in the anti-trust Acts, the court may, upon the conclusion of the testimony therein * * * refer said suit to the Commission as a master in chancery, to ascertain and report an appropriate form of decree therein." When acting as a master in chancery it is clear that the Federal Trade Commission is acting as an agency of the Federal Courts. To give the President the unrestricted power of removal of Federal Trade Commissioners would confer upon him the power to change the essential character of and to dominate the agency selected by a court as a master in chancery. Whatever the power of the President in removing an *executive* officer may be it seems clear that his power to control an agent of the Court is not unlimited.

Under Section 6 of the Act, the Federal Trade Commission has the duty to make certain investigations at the instance of Congress, to report its findings to Congress, to make special and annual reports to Congress and to submit therewith recommendations for additional legislation. It would seem clear that in making such reports and investigations the Commission is acting as an agency of Congress. This power has been likened to that of a Committee of Congress by the Attorney General of the United States. In an opinion dated October 24, 1925, dealing with the powers and duties of the Federal Trade Commission in the conduct of investigations the Attorney General stated:

> "A main purpose of the Federal Trade Commission Act was to enable Congress, through the Trade Commission, to obtain full information concerning conditions in industry to aid it in its duty of enacting legislation. That purpose was emphasized in the proceedings attending the passage of the Act (S. Rep. 583,

63d Cong. 2d Sess., S. Rep. 597, 63d Cong. 2d Sess.); and in the debates the Commission was sometimes likened to a Committee of Congress (statement by Congressman Stevens, 51 Cong. Rec. 14935).[19]

"Resolutions directing investigations pursuant to section 6, subsection (d), are to be limited in their scope to the ascertainment of facts which reasonably and logically tend to show whether or not the Antitrust Acts are being violated by any corporation. The existence or nonexistence of a violation of such acts may be disclosed by acts committed by the corporations under investigation and the effect of such acts upon interstate trade and commerce. The investigations should not in any case be enlarged to include an inquiry into any matter which does not have a direct bearing upon the question whether interstate trade and commerce are being unlawfully monopolized or restrained." (34 Op. Att. Gen. 557).

The work undertaken by the Federal Trade Commission as a direct agent of Congress is perhaps the most important single function performed by the Commission.[20] Since its

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[19] See Appendix B for other debates as to the type of agency intended to be created, p. 63.

[20] EXAMPLES OF LEGISLATION WHICH RESULTED FROM INVESTIGATIONS.

The following is a list of certain legislative acts which, either in whole or in part, were the result of investigations conducted by the Federal Trade Commission at the instance of Congress.

PACKERS AND STOCKYARDS ACT OF 1921
42 Stat. 159; 7 U. S. C. A., Sec. 181 (1921).

"Exhaustive inquiry made by the Commission into conditions in the meat packing industry led to passage of the Packers and Stockyards Act." (Statement of Work of Fed. Tr. Com., p. 26, F. T. C. publication of March, 1932).

"The Commission's report on the meat packing industry led to the introduction of several bills and resolutions in Congress, out of which finally developed the Packers and Stockyards Act." (American Economic Review, Vol. 15, p. 629).

EXPORT TRADE ACT
40 Stat. 516, 15 U. S. C. A., Sec. 61 (1918).

In 1916 the Federal Trade Commission in its report to Congress on Cooperation in American Export Trade emphasized the growth of trade in foreign countries and the encouragement by foreign governments of buying and selling combinations with which American exporters must deal and compete. To

creation the Commission has conducted approximately fifty (50) major investigations at the instance of Congress. It is estimated that approximately one-half of the total amount expended by the Commission has been spent on account of

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meet this important national need, the Export Trade Act was passed on April 10, 1918 (Annual Report, F. T. C., 1921, p. 58).

The Commission's recommendations for the creation of export combinations, composed of competing domestic concerns, were adopted by Congress and embodied in the Webb Act. (American Economic Review, Vol. 15, p. 629).

PROPOSED PUBLIC UTILITY ACT

H. R. 5423, 74th Cong. 1st Sess., Feb. 6, 1935.

There is now pending before Congress H. R. 5423 which is cited as the "Public Utility Act of 1935." This act grew out of the investigation conducted by the Commission under authority of S. Res. 83, 70th Cong., 1st Sess., February 15, 1928. It is considered "the most important inquiry ever undertaken by the commission." (Annual Report, F. T. C., 1932, p. 51).

RADIO ACT

44 Stat. 1174, 47 U. S. C. A., Sec. 81 (1927).

This investigation conducted under the authority of H. Res. 548, 67th Cong., 1923, disclosed certain cross licensing practices. The report to Congress made in response to this investigation contained facts and data which were undoubtedly an aid in the enactment of subsequent Radio legislation. (Annual Report, F. T. C., 1932, p. 267).

CHAIN STORES

Among the most important investigations conducted by the Commission, at the request of Congress under authority of S. Res. 224, 70th Cong. 1st Sess., May 12, 1928, is that pertaining to the Chain Stores. A series of reports have been transmitted to Congress which may be the basis of future legislation. (Statement of Work, F. T. C. publication of March, 1932, p. 22, 23, 24; Annual Report, F. T. C., 1932, p. 256; 1934, p. 30).

SALARIES OF EXECUTIVES INQUIRY

A report on this investigation conducted under authority of S. Res. 75, 73rd Cong. 1st Sess., May 29, 1933, was transmitted to the Senate in fourteen volumes, detailing information as to salaries and other compensation received by officials of corporations having capital and/or assets of more than $1,000,000 and listed on the New York Stock or Curb Exchanges, for the five-year period, 1928-1932.

As a result of this report certain amendments were suggested in the Securities and Exchange Act which would require that reports on the salaries of executives be made to the stockholders. (Annual Report, F. T. C., 1934, p. 25).

INVESTIGATIONS WHICH RESULTED IN THE LOWERING OR ADJUSTMENT OF PRICES SO THAT LEGISLATION WAS UNNECESSARY.

COTTON TRADE

S. Res. 262, 67th Cong. 2nd Sess., March 16, 1923.
S. Res. 429, 67th Cong., 4th Sess., Jan. 31, 1923.

"This report recommended that Congress enact legislation providing for some form of southern warehouse delivery on New York contracts." (F. T. C. Report transmitted to Congress April 28, 1924).

investigations undertaken as such an agent of Congress in aid of legislation.[21] The value of this work in aid of legislation is directly dependent upon the maintenance of the Commission as an independent body.

The theory of a separation of executive, legislative and judicial power lies at the foundation of our Constitutional Government (*supra*, pp. 22 to 23). This does not mean

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The special warehouse committee of the New York Cotton Exchanges on June 28, 1924, adopted the recommendations of the Commission. (Annual Report, F. T. C., 1932, p. 263).

"Reductions in the cost of marketing cotton were a direct result of the Commission's cotton trade investigation." (Statement of Work of Fed. Tr. Com., 1932, p. 27, F. T. C. publication of March, 1932).

FURNISHINGS REPORT
S. Res. 127, 67th Cong., 2nd Sess., Jan. 4, 1922.

"Through disclosure of widespread association activities in violation of the antitrust laws, the Commission aided materially in procuring lower prices for furniture, kitchen furnishings and newsprint paper." (Statement of Work, Fed. Tr. Com. (1932) p. 27, F. T. C. publication of March, 1932).

STATEMENT SHOWING COST BY FISCAL YEARS OF GENERAL INVESTIGATIONS CONDUCTED BY THE FEDERAL TRADE COMMISSION IN AID OF LEGISLATION[1]

Fiscal Year	Total Amount Expended for All Purposes (a)	Amount Expended in Investigations Authorized by Senate and House Resolutions in aid of Legislation (b)	Amount Expended in Investigations at its own instance in aid of Legislation (c)	Total Expended As An Agent of Congress in Aid of Legislation (d) (b and c)
1927	$ 960,704.21	$ 189,552.76	$ 151.83	$ 189,704.59
1928	972,966.04	166,828.84	74,925.71	241,754.55
1929	1,159,459.75	268,028.56	78,053.80	346,082.36
1930	1,494,669.19	478,256.92	54,229.72	532,486.64
1931	1,862,221.72	653,534.29	39,302.63	692,836.92
1932	1,778,427.88	846,916.45	39,992.56	886,909.01
1933	1,393,417.35	586,425.91[2]	30,541.23	616,967.14
1934	1,313,856.11	516,190.84[3]	13,538.39	529,729.23
	$9,627,407.46	$3,705,734.57	$330,735.87	$4,036,470.44

[1] Source—Annual Reports of Federal Trade Commission.

[2] Includes $737.98 expended setting up new division to administer Securities Act.

[3] Includes $186,751.29 expended administering Securities Act and organizing new division which later became Securities and Exchange Commission.

an absolute separation. But it does mean that no branch of the Government, except as permitted by the Constitution, shall usurp any of the essential functions of the other branch. While the President is given the duty to see that the laws are properly enforced it is clear that this duty is confined to those laws which Congress has enacted. Congress having enacted a law setting forth a reasonable legislative standard for the removal of a Federal Trade Commissioner, it would seem that the President's duty to enforce the law was limited to an exercise of his executive power of removal in accordance with the law. The executive power of removal would remain with the President. To hold otherwise in this case would permit the President effectively to usurp the functions of other branches of the Government by controlling a legislative agent of Congress and an agent of the Courts.

It is respectfully submitted that the answer to question number 2 submitted to this Court by the Court of Claims is "Yes."

CONCLUSION.

For the reasons stated and on the authority of the cases cited above, it is respectfully submitted that the answer to each of the questions certified to this Court should be "Yes."

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APPENDIX A.

Synopsis of Legislative History of the Federal Trade Commission Act Showing That Congress Intended That a Commissioner May Be Removed by the President for "Inefficiency, Neglect of Duty, or Malfeasance in Office," and for No Other Cause.

In response to President Wilson's message to Congress of January 20, 1914, recommending the formation of a commission to assist and guide business, the House Interstate and Foreign Commerce Committee presented a bill, H. R. 15613, to the House of Representatives, 63d Congress, 2d Session. This bill was intended to create an interstate trade commission.[1] It provided:

> "Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."

In the report to the House accompanying H. R. 15613, Representative Covington, author of the bill, and chairman of the subcommittee of the House Interstate and Foreign Commerce Committee that had prepared it, indicated that in drafting the bill it had been his intention to create a commission as a free and independent body. The report in this regard stated:

> *63d Congress, 2d Session. House of Representatives. Report No. 533, Committee on Interstate and Foreign Commerce.*
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> "But the great value to the American people of the Interstate Commerce Commission has been largely because of its independent power and authority. The dignity of the proposed commission and the respect in which its performance of its duties will be held by the people will also be largely because of its independent

[1] The House passed H. R. 15613 without amendment.

power and authority. *Therefore the bill removes entirely from the control of the President and the Secretary of Commerce the investigations conducted and the information acquired by the commission under the authority heretofore exercised by the Bureau of Corporations or the Commissioner of Corporations.* All such investigations may hereafter be made upon the initiative of the commission, within constitutional limitations, and the information obtained may be made public entirely at the discretion of the commission.'" (p. 3). (Italics supplied).

The debates in the House clearly show the intention of this body to create a commission free and independent of any control by the President.

In answering the criticism that the Commission would not be subject to the control of the head of a department or even to the control of the President, Representative Willis, of Ohio, member of the Interstate and Foreign Commerce Committee, stated in the House:

> "The bill is criticized because, under its terms, it is proposed that this commission shall not be subject to the Commissioner of Corporations or to the head of the Department of Commerce, or even to the President. The bill is criticized because the authors of it have made an attempt to make this commission an independent body, responsible only to the American people. *I am frank to say that, in my judgment, that is one of the reasons why this bill is to be commended—because it contemplates the creation of a commission that shall not be subject to anybody in the Government, but shall be subject only to the people of the United States. I hope and believe that if this bill shall be enacted into law it will not be possible to have such a situation as to corporate control and political management as we find at present.*" (Cong. Rec., Vol. 51, p. 8981). (Italics supplied).

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[1] Representative Covington, in explaining H. R. 15613 in the House, repeated the above statement. (Cong. Rec., Vol. 51, p. 8842).

In comparing the proposed commission with the then Bureau of Corporations, Representative Willis said:

> "• • • *the object of this bill is to create a body, a commission, an organization that shall not be under political domination or control, and that there shall not be the probability or possibility of such a thing. It seems to me that this is a commendable feature of the bill—the idea that this commission is to be entirely separate and apart from any existing department of the Government, not subject to the orders of the President,* not compelled to report to the President or to the Secretary of Commerce." (Cong. Rec., Vol. 51, p. 8982). (Italics supplied).

In commenting on the publication of reports of commission investigations as being within the discretion of the commission, he said:

> "• • • I think that is a wise provision, because it makes this interstate trade commission absolutely independent of any exterior authority in that regard." (Cong. Rec., Vol. 51, p. 8983).

Representative Covington, author of the bill, and chairman of the subcommittee of the House Interstate and Foreign Commerce Committee that had prepared it, in reply to a suggested amendment which would limit the independent discretion of the commission in dealing with its investigations, said:

> "This amendment is offered to the section which transfers the powers of the Bureau of Corporations to the interstate trade commission. One of the most serious objections to that bureau at the time it was created, in the administration of the then President Roosevelt, was that he was able, through the statute then written, to hold in the hollow of his hand and use at his imperious will the information gathered by the investigations conducted under it; and one of the

motives of this committee in transferring these powers in the way that they are transferred was to provide that the information obtained should be made public under this section at the discretion of the commission. If we strike out the words in this section and insert the words 'shall be furnished to the Interstate Commerce Commission and to all railroads or corporation commissions' the effect will be to eliminate entirely that provision which makes this publicity a real, independent publicity, and will restore to the control of the President entirely the publicity obtained under that section." (Cong. Rec., Vol. 51, pp. 8993-8994).

The amendment was rejected. (Cong. Rec., Vol. 51, p. 8994).

Representative Graham, of Pennsylvania, member of the House Judiciary Committee which also considered portions of this bill, clearly indicated that in his opinion the bill provided for a commission absolutely independent of the power and control of the President. To make the tenure of office of these commissioners even more secure than provided in the bill, where the commissioners were removable "by the President for inefficiency, neglect of duty, or malfeasance in office," Representative Graham proposed in an amendment:

"• • • after the word, 'President,' insert the words 'by and with the advice and consent of the Senate.'" (Cong. Rec., Vol. 51, p. 8987).

In support of this proposed amendment he said:

"• • • An industrial commission is not a part of the executive department of the Government • • • It is more nearly related to the judicial function of the Government, and I would wish to see the tenure of office made as secure as possible. Indeed, it was in my thought to suggest that the removal of one of these commissioners, and also of one of the Interstate Commerce Commission, which is now exercising such great

powers and discharging such responsible duties, ought to be made only by impeachment in the manner in which we would remove a judge from office. It is in order that these men should be lifted above politics and put upon a high plane. The appointment itself contains the element of political selection, but I make no suggestion about changing that. I refer simply to what will make the men in office more secure, more independent in their action and conduct, and to that end they ought to be removed from office only by and with the advice and consent of the Senate. * * * I recognize that the language of this bill is copied from the act creating the Interstate Commerce Commission, and I also recognize that when the Interstate Commerce Commission was created this sort of legislation was in its infancy and that there is room for improvement in all such provisions. *So far as merely appointive officers are concerned occupying positions in the executive departments of the Government and their removal may be concerned it ought to be within the power of the Executive to remove them,* and so far as such officials come within his domain I would make no objection, *but we are creating something now that lies outside the Executive and more nearly approaches the judicial.* We are creating an organization that in the discharge of its duties will exercise functions as high and as great as any ever exercised by judges upon the bench and the tenure of their office ought to be made as secure as possible, and this small amendment would help to create confidence in the independence and endurance of the commission. * * * *If the limitation were connected with officials absolutely in the executive departments of the Government, there might be a question as to the constitutionality of such a provision, but this commission is not connected with the executive department, but made and declared to be absolutely independent of the power and control of the President.*" (Cong. Rec., Vol. 51, pp. 8987-8988). (Italics supplied).

Representative Covington in reply to the amendment submitted by Representative Graham declared that H. R. 15613 as then drafted limited the President's power of removal.

He also suggested that the Congress had no power further to limit the President's power of removal by compelling him to share it with the Senate. He stated:

> "* * * we can not circumscribe the constitutional right of the President to remove for cause, such as malfeasance in office and otherwise, those statutory officers of the United States created merely by act of Congress." (Cong. Rec., Vol. 51, p. 8988).

The amendment was rejected. (Cong. Rec., Vol. 51, p. 8988).

While the House was considering H. R. 15613 the Senate Interstate Commerce Committee was also drafting a bill, S. 4160, which provided for a Federal Trade Commission. Upon the passage of H. R. 15613 in the House it was referred to the Senate Interstate Commerce Committee, and the Committee reported H. R. 15613, together with S. 4160, to the Senate, recommending in their report[1] that S. 4160 be substituted for the House bill; H. R. 15613.

Debate in the Senate was almost exclusively upon the provisions of S. 4160, and this bill, with amendments, was eventually passed by the Senate.

The Senate bill, S. 4160, like the House bill, H. R. 15613, provided that:

> "Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."

This provision of these bills was never altered, amended, or limited, either in the Senate or in the House.

Upon the objection of the House to passing the Senate bill, S. 4160, a conference committee combined the two bills,

[1] Senate Report, No. 597, Senate Interstate Commerce Committee, 63d Congress, 2d Session.

H. R. 15613 and S. 4160, and the bill as thus made up was passed by both houses.[4]

Senator Newlands, chairman of the Senate Interstate Commerce Committee,[5] in the report of this committee to the Senate[6] to accompany H. R. 15613 and S. 4160, clearly indicated the intention of this committee to provide for a commission which would be free and independent of any control by the President or any other authority. The report stated:

63d Congress, 2d Session. Senate. Report No. 597. Committee on Interstate Commerce.

"* * * Had we submitted the administration of the antitrust act to an impartial quasi judicial tribunal similar to the Interstate Commerce Commission instead of to the Attorney General's Office, with its shifting officials, its varying policies, its lack of tradition, record, and precedent, we would by this time have made gratifying progress in the regulation and control of trusts through the quasi judicial investigations of a competent commission and through legislation based upon its recommendations. As it is, with the evasive and shifting incumbency and administration of the Attorney General's Office, oftentimes purely political in character, we find that the trusts are more powerful today than when the antitrust act was passed, and that evils have grown up so interwoven with the general business of the country as to make men tremble at the consequence of their disruption.'[7] (p. 6).

"While the Bureau of Corporations, which was established by an act of February 14, 1903, provided in some measure for the needs now generally rec-

[4] The two bills were substantially alike except for name, number of commissioners, and the additional powers granted the commission in the Senate Bill S. 4160, these additional powers being those now provided for in Sec. 5 of the Federal Trade Commission Act.

[5] The Senate Interstate Commerce Committee prepared the bill, S. 4160, providing for a Federal Trade Commission.

[6] Senate Report, No. 597, Senate Interstate Commerce Committee, 63d Congress, 2d Session.

[7] Requoting a previous statement made by Senator Newlands. This is also reported in Cong. Rec., Vol. 51, p. 11088.

ognized and has been of great value and public benefit in describing in detail the conditions in particular industries, and the organization, operation, and conduct of particular companies, the field which has been covered has necessarily been restricted and its organization as a division of an executive department under a single head, reporting only to the President, has not given to it either the authority or prestige which attaches to an independent commission, such as the Interstate Commerce Commission. Yet the need of such a position is quite as necessary in the Governmental supervision of industrial activities as of railroads.[1] (p. 9).

* * * * * *

"It is provided that the Commission shall be composed of five commissioners with a regular term of seven years, but the terms are so arranged that the whole membership will not be subject to a complete change at any one time. The work of this commission will be of a most exacting and difficult character, demanding persons who have experience in the problems to be met—that is, a proper knowledge of both the public requirements and the practical affairs of industry. It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience. The terms of the commissioners should expire in different years, in order that such changes as may be made from time to time shall not leave the commission deprived of men of experience in such questions.[2] (p. 10).

"One of the chief advantages of the proposed commission over the Bureau of Corporations lies in the fact that it will have greater prestige and independence, and its decisions, coming from a board of several persons, will be more readily accepted as impartial and well considered. For this reason also it is essential that it should not be open to the suspicion of partisan direction, and this bill provides, therefore, that not more

[1] This is also reported in Cong. Rec., Vol. 51, p. 11089.

[2] This is also reported in Cong. Rec., Vol. 51, p. 11089.

than three members of the commission shall belong to any one political party.[10] (p. 11).

"The first question is: Shall an interstate trade commission of some kind be organized? I imagine that there can hardly be any difference of opinion on the point that there should be an administrative tribunal of high character, nonpartisan, or, rather, bipartisan, and *independent of any department of the Government.* I assume also that there should be a commission rather than one executive official, because there are powers of judgment and powers of discretion to be exercised. The organization should be quasi judicial in character. We want tradition; we want a fixed policy; we want trained experts; we want precedents; we want a body of administrative law built up. *This cannot be well done by the single occupant of an office, subject to constant changes in its incumbency and subject to higher executive authority. Such work must be done by a board or commission of dignity, permanence, and ability, independent of executive authority except in its selection, and independent in character.*[11] (Appendix, p. 22). (Italics supplied).

"The next question is, What shall be the powers of the commission? Shall they be confined to investigation, requirement of statements, publicity, and recommendation to the President and to Congress, or shall they go further?

"I would deem it very beneficial even if we could get a bill that would go no further than that, because we would then have five men of high ability and character who would immediately start upon this as their life work—not the kind of work that we do, broken up by thousands of other considerations and by other duties, but whose specialty it would be to ascertain the facts and the abuses requiring correction, and to give publicity regarding them and then to make their recommendation to Congress.'"[12] (Appendix, p. 23).

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[10] This is also reported in Cong. Rec., Vol. 51, p. 11089.

[11] Requoting a previous statement of Senator Newlands. This is also reported in Cong. Rec., Vol. 51, p. 11092.

[12] Requoting a previous statement of Senator Newlands. This is also reported in Cong. Rec., Vol. 51, p. 11093.

The debates in the Senate clearly show the intention of this body to create a commission free and independent of any control by the President or any other authority.

Senator Newlands in introducing the bill, S. 4160, into the Senate said:

> "The need has long been felt for an administrative board which would act in these matters in aid of the enforcement of the Sherman antitrust law, which would have precedents and traditions and a continuous policy *and would be free from the effect of such changing incumbency as has in the nature of things characterized the administration of the Attorney General's Office.* (Cong. Rec., Vol. 51, p. 10376). (Italics supplied).
>
> "The Sherman law was passed about the same time as the interstate commerce act; and its administration was intrusted to the shifting incumbency of the Attorney General's Office, that incumbency changing frequently, having changed in one administration three or four times. The result was that instead of having an established system of administrative law the administration of that law was intrusted to the shifting officials with the varying policies and varying views of the respective Attorneys General; and it is only recently that we have obtained from the courts a full exposition, declaration, and interpretation of the law itself. Had this commission been in existence during all the years of the Sherman antitrust law it is clear that the organization of these great trusts, since accomplished, would have been prevented, and all of the trusts then existing would have been brought under the steady, purposeful, continuous administration of the law, and without violent wrenches in the business of the country readjustments would have been made that would have resulted in the dissolution of these corporations and their reintegration in harmony with the law." (Cong. Rec., Vol. 51, p. 11082).

In emphasizing the importance of permanency and independence of the members of the commission, Senator New-

lands compared the Attorney General's Office with the Interstate Commerce Commission. He stated:

"The inefficiency of the Attorney General's Office has arisen, not from the lack of ability or integrity of officials, but from the fact that society having determined to relieve the individual from the trouble and expense of prosecuting these cases by itself taking them in charge has put the *function of enforcing the antitrust act upon a department the incumbency of which is changing continually, there having been, I believe, three or four Attorneys General in one administration.*

"Another difficulty has arisen: *We have thus had, by reason of this changing incumbency, the varying policies of minds, able and brilliant, but differing in their views, with the consequent demoralization of the entire force engaged in the administration of this law. In addition to this, the Attorney General is in a measure a political officer. He belongs to the political department of the Government, the executive department; he sits in the President's Cabinet; and the Attorney General's Office feels the pressure of expediency everywhere*——" (Italics supplied).

SENATOR BORAH. "I think the Senator and I agree."

SENATOR NEWLANDS. "Expediency with reference to the fate of the administration in power; expediency with reference to the fate of the party in power. We had an illustration of that when at a time of great financial disaster the proposal was made to a President of the United States, as to whether monopoly should be increased by the acquisition by the United States Steel Co. of the property of the Tennessee Coal & Iron Co. Upon the suggestion that the taking up of the securities of that company would relieve a most tense financial situation, the President, responding to a patriotic impulse and acting only as he thought for the public good, practically sanctioned a transaction which was against the law with a view of averting a great financial disaster, and he went so far as to impress his view upon the Attorney General

of the United States, charged with the function of enforcing this law. There a great financial emergency operated upon the political department of the Government to avert the enforcement of this law.

"Everywhere along the line this influence is felt. An election is approaching and the powers of monopoly are aroused to prevent or to slow down a certain prosecution, and the idea is circulated that the continuance of that prosecution or of many prosecutions will have a disturbing effect upon the business of the country and affect the coming election, and political pressure is brought to slow down and retard the enforcement of the law. So we have these political exigencies arising all along and preventing the proper enforcement of the law.

"*We have found in the Interstate Commerce Commission a nonpartisan organization, which moves absolutely free from the influence either of Congress or of the President, an independent organization charged with the enforcement of the interstate commerce act, and commencing that enforcement at the same time that the Attorney General started in upon the enforcement of the Sherman antitrust law.* We find, however, by way of contrast that almost every transportation question has been settled, whilst we are just upon the threshold of the adjustment of the trust question; and meanwhile even the prevention of the creation of these great aggregations has not been accomplished. We have not only failed to destroy those which were in existence when the act was created, but we have failed to prevent the organization of others.

"I cast no reflection upon any President of the United States or upon any Attorney General, but I say the system is a bad one, and, so far as I am concerned, I would gladly turn over the entire enforcement of the Sherman antitrust law to a nonpartisan, independent tribunal; but I do not think public sentiment is ripe for it, and therefore I want to go as far as I can in that direction, and I think we have gone as far as we can. (Cong. Rec., Vol. 51, p. 11235). (Italics supplied).

"The Attorney General's Office is a part of the political department of the Government, subject, as we

know, in the past to political influences, so that prosecutions have been accelerated and prosecutions have been slowed down because of the exigencies of the hour. Has there been anything of that kind in the administration of the interstate-commerce law by the Interstate Commerce Commission? No; it has moved on with dignity, precision, consecutiveness, and power, until it has covered the entire field of railroad administration and has declared principles that are known to all, so much so that there is nothing left now in railroad administration except the control of securities and the valuation of the roads themselves. The administration of the interstate-commerce act side by side for the last 20 years with the administration of the antitrust act, one intrusted to a commission and the other intrusted to an officer of the political department of the Government, indicates the superiority of the former system." (Cong. Rec., Vol. 51, p. 12031).

Senator Norris agreeing with Senator Newlands said:

"I should like to call attention to a statement made by the Senator from Nevada (Mr. Newlands) which he has repeated at least twice during the discussion of this bill, and which I think he is justified in making from the history of the past. In substance it is that the Attorney General, being a political officer, part of an administration connected closely with the politics and the political conditions of the country, often does not enforce the law for reasons that would not move a body such as, according to his theory, the trade commission will be, namely, a permanent, nonpartisan organization, and one that will not vary with changing conditions in politics.

"I think there is a great deal in the suggestion that the Senator has made. *His theory is that the proposed trade commission will not be influenced by considerations of that kind, because it will be beyond political parties or the changing of administrations from one party to another, and for that reason may do things that the Attorney General for political reasons can not do.* (Cong. Rec., Vol. 51, p. 12647). (Italics supplied).

"I am not assuming that it will be a nonpartisan commission; I was making a statement deduced from what the Senator from Nevada had said, and I perhaps would have been a little more accurate if I had said that the idea of the Senator from Nevada was—and I think that is right—that it would be a permanent commission, one that would not be dependent upon the success of any political party or any administration to continue it in power, and therefore would feel like enforcing the law without reference to what effect it might have on politics. * * *" (Cong. Rec., Vol. 51, p. 12648).

Senator Cummins, of Iowa, member of the Senate Interstate Commerce Committee, in reply to Senator Borah, of Idaho, who had voiced fears in that there were no means given by this bill of controlling this commission, said:

"I agree to the last proposition of the Senator from Idaho, and it forms the reason for the favor I entertain for the commission. If a commission goes wrong, it can be legislated out of existence. It is subject, in a way, to the temper of the people, and certainly subject to the power of Congress. Unfortunately, the courts of the United States are removed from both Congress and the will of the people. When the judges are appointed they are appointed during good behavior, which means, ordinarily, during life. It seems to me that the argument of the Senator from Idaho leads naturally and inevitably to the creation of a commission, through which some part of this work can be done, rather than to intrust it all to the administration of the courts.

"For one I do not believe the courts can administer a law regulating commerce in many instances with efficiency, and I should like to suggest that view of the case to the Senator from Idaho, who, I know, wants an effective law. We always have our hands on the commission, not to influence its action in a particular case but, if it proves unfaithful, to dispose of it by legislation." (Cong. Rec., Vol. 51, p. 11236).

Senator Fletcher, in answer to Senator Cummins, showed that it was the intention and belief of the Senate in passing

this bill that a commissioner could only be removed "for inefficiency, neglect of duty, or malfeasance in office," as provided by the bill.

"Mr. President, I am somewhat impressed with the Senator's observation with regard to vesting so much power in the commission, and I am inclined to sympathize somewhat with that thought. It seems to me that we are in danger of transferring to commissions a large number of the functions and activities of the Government, which may eventually prove rather a dangerous situation to us; and this commission undoubtedly would have tremendous power over all the industries of the country. The Senator's attention, however, is called to the fact that each commissioner is appointed only for seven years, and that he is subject to removal for malfeasance in office.

"I wish to inquire of the Senator whether he can suggest any better way of controlling a commission of this kind. It seems to me that is perhaps more effective than the power of legislating them out of office, as suggested by the Senator from Iowa. Under this bill the term of each of these commissioners expires in seven years, and the President has the power to remove in the case of misconduct or malfeasance in office. Is there any way the Senator can arrange or suggest what will give a better control over the situation than that?" (Cong. Rec., Vol. 51, p. 11237).

APPENDIX B.

Legislative History of the Federal Trade Commission Act Showing That Congress Intended the Commission to Perform Functions as an Agent of the Legislature and the Judiciary.

That the House and the Senate did intend to remove this commission from the control and interference of any other authority and believed that they had the power to so do is shown by their discussion concerning the type of commission they were intending to create by these bills.

Representative Stevens, of Minnesota, member of the House Interstate and Foreign Commerce Committee,[1] in explaining the functions of this commission said:

> "* * * In the first place, this bill is drafted to perform two functions—first, to assist in the judicial power of government in enforcing the laws, and, in the second place, to assist the legislative power of our Government in finding out the right information and in formulating and adopting the right kind of legislation." (Cong. Rec., Vol. 51, p. 9058).

Representative Esch, of Wisconsin, member of the House Interstate and Foreign Commerce Committee,[2] in this regard said:

> "The object and purpose of our committee in framing this bill was not to create out of this commission a court. We believed that the commission should be practically a branch of the legislative department of the Government, administering the rights which are granted to it by the bill itself. We could not delegate to it our legislative functions, but we could circumscribe the limits within which it should operate. * * *" (Cong. Rec., Vol. 51, p. 9053).

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[1] The House Interstate and Foreign Commerce Committee reported this Bill, H. R. 15613, to the House of Representatives.

[2] See note 1, supra.

Representative Covington,[3] in explaining the constitutional basis for the powers of the commission as an agency of Congress, said:

> "Insofar as the investigations under this section as the result of resolutions of Congress, or either House thereof, are concerned, the commission is authorized to perform a legal and certainly a most beneficient function. Congress, having the constitutional authority to legislate in regard to interstate and foreign commerce, has the power to obtain all the information necessary to make such legislation appropriate and adequate. Its future regulation of industrial corporations engaged in interstate and foreign commerce may be as much determined by information concerning the present practices of corporations in violation of law as otherwise. In its judgment the existing substantive law or procedure of the courts may be ineffective and new remedial legislation may be the solution. In repeated cases the Supreme Court has held that 'Congress may not delegate its purely legislative power to a commission,' but it has not been held that Congress may not by a commission elicit information in order to lay the foundation for intelligent and effective action in the matter of regulating interstate and foreign commerce." (Cong. Rec., Vol. 51, p. 8845).

Representative Covington,[4] in explaining the powers of the commission as an aid to the courts, compared its function with that of a master in chancery deriving its power from the courts:

> "In Section 12 there is conferred upon the commission a broad and useful power as adjunct to the courts in suits arising under the antitrust laws. This is another essential power not vested in the Bureau of Corporations. There has been no proper bureau equipped with a trained force to assist the Department of Justice

[3] Representative Covington was the author of the House Bill, H. R. 15613, and the chairman of the subcommittee of the House Interstate and Foreign Commerce Committee delegated to draft such a bill.

[4] See note 3, *supra*.

and the courts in solving the difficult economic problems connected with the dissolution of corporations which have been adjudged to be operating in violation of the antitrust laws, and one of the most effective powers conferred upon the interstate trade commission is that contained in the section authorizing the courts to refer to it the matters of the pending suit at the conclusion of the testimony therein to ascertain and report an appropriate form of decree. The purpose of such investigation is to give the court the most complete economic information to assist it. This power, of course, does not authorize the commission to gather evidence to be offered in any case considered by the court as the basis of its judgment, and it amply safeguards the constitutional rights of defendants by reserving to them the same right to file exception to the report that now exists in relation to masters' reports in equity causes in the Federal courts. The commission, as an independent body of specialists, will, however, have placed upon it the proper burden of framing the plans for the effective segregation and readjustment of unlawful combination, subject, of course, to the approval of the court." (Cong. Rec., Vol. 51, p. 8846.)

REPRESENTATIVE TOWNER. "I wanted to say to the gentleman that, as I understood it, in cases of this character this report of the commission upon the request of the court was to be treated as the report of a master in chancery. If that is the case, I commend the gentleman and the committee, because it seems to me that that is not only a very ingenious and very expeditious method of treatment, but it is entirely within the powers of every court in every instance where a court desires to have before it in a case of equity a report from a master in chancery. It has a very large discretionary power. It is not bound to accept the report of the master in chancery, neither would the court here be bound to accept the report of the commission. But it might act upon it and use it, and it seems to me that that is not only perfectly legal, but a very expeditious and well-informed method of getting the information before the court."

REPRESENTATIVE COVINGTON. "* * * It does just what Judge Towner has so accurately expressed—it has provided this machinery in a rather happy way and imposed on the commission practically the function of a master in chancery." (Cong. Rec., Vol. 51, p. 8847).

Representative Graham, of Pennsylvania, member of the House Judiciary Committee,[1] said in this regard:

"* * * An industrial commission is not a part of the executive department of the Government * * * It is more nearly related to the judicial function of the Government, and I would wish to see the tenure of office made as secure as possible. Indeed, it was in my thought to suggest that the removal of one of these commissioners, and also of one of the Interstate Commerce Commission, which is now exercising such great powers and discharging such responsible duties, ought to be made only by impeachment in the manner in which we would remove a judge from office. It is in order that these men should be lifted above politics and put upon a high plane. The appointment itself contains the element of political selection, but I make no suggestion about changing that. I refer simply to what will make the men in office more secure, more independent in their action and conduct, and to that end they ought to be removed from office only by and with the advice and consent of the Senate. * * * I recognize that the language of this bill is copied from the act creating the Interstate Commerce Commission, and I also recognize that when the Interstate Commerce Commission was created this sort of legislation was in its infancy and that there is room for improvement in all such provisions. So far as merely appointive officers are concerned occupying positions in the executive departments of the Government and their removal may be concerned it ought to be within the power of the Executive to remove them, and so far as such officials come within his domain I would make no objection, but we are creating something now that lies outside the Execu-

[1] The House Judiciary Committee had considered portions of the bill, H. R. 18613.

tive and more nearly approaches the judicial. We are creating an organization that in the discharge of its duties will exercise functions as high and as great as any ever exercised by judges upon the bench and the tenure of their office ought to be made as secure as possible, and this small amendment would help to create confidence in the independence and endurance of the commission. * * * If the limitation were connected with officials absolutely in the executive departments of the Government, there might be a question as to the constitutionality of such a provision, but this commission is not connected with the executive department, but made and declared to be absolutely independent of the power and control of the President.'"[6] (Cong. Rec., Vol. 51, pp. 8987-8988).

[6] See also comments on this proposed amendment by Representative Graham on pp. 51-52, *supra*.

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 667

SAMUEL F. RATHBUN, AS EXECUTOR OF THE ESTATE of William E. Humphrey, deceased

v.

THE UNITED STATES

ON CERTIFICATE FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The Court of Claims rendered no opinion.

JURISDICTION

The certificate of the Court of Claims was filed January 26, 1935 (R. 16). The jurisdiction of this Court rests on Section 3 (a) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939.

QUESTIONS PRESENTED

The questions certified read as follows:

1. Do the provisions of Section 1 of the Federal Trade Commission Act, stating that "any commis-

sioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office", restrict or limit the power of the President to remove a commissioner except upon one or more of the causes named?

If the foregoing question is answered in the affirmative, then—

2. If the power of the President to remove a commissioner is restricted or limited as shown by the foregoing interrogatory and the answer made thereto, is such a restriction or limitation valid under the Constitution of the United States?

STATUTE INVOLVED

The statute involved is the Federal Trade Commission Act of 1914, c. 311, 38 Stat. 717 (U. S. C., Title 15, Secs. 41, 42), which provides in part as follows:

> * * * That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the Commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their

successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. * * *

SEC. 2. That each commissioner shall receive a salary of $10,000 a year, payable in the same manner as the salaries of the judges of the courts of the United States. * * *

STATEMENT

The material facts as disclosed by the certificate may be summarized as follows (R. 1–15):

The plaintiff, who is the duly appointed executor of the last will and testament of William E. Humphrey, deceased, brought suit in the Court of Claims to recover the sum of $3,043.06, together with interest thereon, which sum he alleges was due to the deceased for salary as a Federal Trade Commissioner from October 8, 1933, to February 14, 1934 (R. 1–15). The executor alleged that on January 26, 1925, the deceased was nominated as a Federal Trade Commissioner for a term expiring September 25, 1931, and that this nomination was confirmed by the United States Senate (R. 2). That on June 30, 1931, the deceased received a re-

cess appointment as a Federal Trade Commissioner for a term expiring September 25, 1938, and that on January 27, 1932, pursuant to his nomination to such office he was confirmed by the United States Senate as a Federal Trade Commissioner for a term expiring September 25, 1938 (R. 2). Following these various recess appointments and confirmed appointments, the deceased at the appropriate times took the required oaths of office and entered upon the exercise of the duties of a Commissioner of the Federal Trade Commission (R. 2–3).

Between July 19, 1933, and October 7, 1933, an exchange of communications took place between the President of the United States and the deceased, wherein the President requested that the deceased resign his position as a Federal Trade Commissioner, stating that the request was made "without any reflection at all upon you personally, or upon the service you have rendered in your present capacity" and stating, among other reasons for requesting the resignation, that he felt "the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection" (R. 4), and "I think it best for the people of this country that I should have a full confidence" (R. 6). The deceased was unwilling to resign, and the President of the United States on October 7, 1933, acting in his discretion, removed the deceased from his office as a Federal Trade Commissioner (R. 8).

On October 27, 1933, George C. Mathews was appointed by the President as a Federal Trade Commissioner to fill the vacancy created by the removal of the deceased (R. 10). On January 31, 1934, the nomination of George C. Mathews as a Federal Trade Commissioner was confirmed by the United States Senate (R. 12). The deceased, subsequent to October 7, 1933, was not permitted to perform any of the duties of a Federal Trade Commissioner by the Federal Trade Commission, which recognized the validity of the President's order of removal, nor did he receive any salary beyond that date (R. 9, 13). The deceased duly protested the legality of his removal, and addressed a number of letters evidencing his protest to the Federal Trade Commission, the Secretary of the Federal Trade Commission, the Chief of Accounts and Personnel, and the Disbursing Clerk of the Federal Trade Commission (R. 8–12). From October 7, 1933, until his death on February 14, 1934, the deceased was without employment in any other capacity, and was ready and willing to perform the duties of a Federal Trade Commissioner, and at all times held himself in readiness for that purpose (R. 13).

The petition alleged that the attempted removal of the deceased by the President of the United States was illegal and void and was insufficient to deprive him of his rights to the powers, privileges, and emoluments of the office of a Federal Trade Commissioner (R. 12).

The United States filed a demurrer to the petition, and, without ruling upon the demurrer, the Court of Claims certified to this Court the questions herein presented (R. 15).

SUMMARY OF ARGUMENT

I

In *Shurtleff v. United States*, 189 U. S. 311, this Court held that the Customs Administrative Act of 1890, which provided that a member of the Board of General Appraisers could be removed by the President for inefficiency, neglect of duty or malfeasance in office, did not confine the President's removal power to those causes alone. The language contained in the Federal Trade Commission Act is identical with that used in the Customs Administrative Act and in a number of other statutes. In order to establish a limitation on the removal power of the President, Congress amended the Customs Administrative Act to provide expressly that a removal could be made for one of the stated causes and for no other. The same limitation occurs in several other statutes. There is nothing in the language or the legislative history of the Federal Trade Commission Act to indicate that Congress intended to depart from the meaning established in the *Shurtleff* case. In *Myers* v. *United States*, 272 U. S. 52, this Court was apparently agreed that the rule of construction in the *Shurtleff* case is applicable to the Federal Trade Com-

mission Act. A departure from this construction would raise a serious constitutional question.

II

If the Federal Trade Commission Act should be interpreted to limit the removal power of the President to the causes stated, it is an unconstitutional interference with the executive power of the President. No sound distinction can be drawn in this respect between the case at bar and the *Myers* case. A limitation of the grounds of removal is at least as substantial an interference with the executive power as is a requirement that the Senate participate in the removal. There is nothing in the nature and functions of the Federal Trade Commission to justify a departure from the *Myers* case. The functions of a so-called legislative and quasi-judicial character which the Commission performs are in no essential respects different from those committed to the heads of departments.

ARGUMENT

I

SECTION 1 OF THE FEDERAL TRADE COMMISSION ACT DOES NOT DEPRIVE THE PRESIDENT OF THE POWER TO REMOVE A COMMISSIONER EXCEPT FOR INEFFICIENCY, NEGLECT OF DUTY, OR MALFEASANCE IN OFFICE

The first question certified by the court below is whether the provision of Section 1 of the Federal Trade Commission Act stating that "any commissioner may be removed by the President for inef-

ficiency, neglect of duty, or malfeasance in office" restricts or limits the power of the President to remove a Commissioner except upon one or more of the causes named. While this Court has never passed upon the provision of the Federal Trade Commission Act whose meaning is here in question, the Court has in *Shurtleff* v. *United States,* 189 U. S. 311, determined the meaning of identical language contained in a similar statute.[1]

Shurtleff was a general appraiser of merchandise, appointed pursuant to the Act of June 10, 1890, c. 407, 26 Stat. 131. That Act provided that there should be created a board of general appraisers of merchandise consisting of nine members, not more than five of whom should belong to the same political party, and that any of these appraisers could be removed from office at any time for inefficiency, neglect of duty, or malfeasance in office.

In 1899 President McKinley removed Shurtleff from the office of general appraiser of merchandise without specifying any reasons therefor. Shurtleff thereafter brought suit for his salary, stating that his removal was illegal, inasmuch as it was not predicated upon any of the grounds for removal set forth in the statute. The question which this Court

[1] The same language is to be found in the Acts creating the Interstate Commerce Commission (Feb. 4, 1887, c. 104, Sec. 11, 24 Stat. 379, 383), the United States Shipping Board (Sept. 7, 1916, c. 451, Sec. 3, 39 Stat. 728, 729), and the United States Tariff Commission (Sept. 8, 1916, c. 463, Sec. 700, 39 Stat. 756, 795). See *Myers* v. *United States,* 272 U. S. 52, 262, note 80 (c).

was called upon to determine was stated by it to be, "can the President exercise the power of removal for any other causes than those mentioned in the statute; in other words, is he restricted to a removal for those causes alone or can he exercise his general power of removal without such restriction?" In holding that the specification in the statute of certain causes of removal did not limit the general power of the President to remove in his discretion, the Court said (189 U. S., at 317):

> In making removals from office it must be assumed that the President acts with reference to his constitutional duty to take care that the laws are faithfully executed, and we think it would be a mistaken view to hold that the mere specification in the statute of some causes for removal thereby excluded the right of the President to remove for any other reason which he, acting with a due sense of his official responsibility, should think sufficient.

The language employed in the Federal Trade Commission Act in respect of the presidential power of removal is identical with that used in the Act creating the office from which Shurtleff, as this Court held, was lawfully removed.

The opinions in *Myers* v. *United States*, 272 U. S. 52, make it clear that the rule of construction announced in the *Shurtleff* case is controlling with respect to the Federal Trade Commission Act. The argument was advanced in the *Myers* case that

through a long course of practice Congress had imposed restrictions on the removal power of the President. In considering this argument, Chief Justice Taft pointed out that in view of the rule of the *Shurtleff* case, wherever Congress used language like that employed in the Customs Administrative Act it did not purport to limit the President to removal for the causes specified. The Chief Justice said (272 U. S., at pp. 171–172):

> Since the provision for an Interstate Commerce Commission, in 1887, many administrative boards have been created whose members are appointed by the President, by and with the advice and consent of the Senate, and in the statutes creating them have been provisions for the removal of the members for specified causes. Such provisions are claimed to be inconsistent with the independent power of removal by the President. This, however, is shown to be unfounded by the case of *Shurtleff* v. *United States*, 189 U. S. 311 (1903). * * * This is an indication that many of the statutes cited are to be reconciled to the unrestricted power of the President to remove, if he chooses to exercise his power.

On this question of construction there was no disagreement in the *Myers* case. The opinion of Mr. Justice Brandeis, dissenting, is even more explicit in stating that under the rule of the *Shurtleff* case the Federal Trade Commission Act does not limit the power of removal to the causes specified.

In analyzing statutory provisions concerning removal, Mr. Justice Brandeis refers (p. 262, n. 30) to that class of provisions which authorize removal for "Inefficiency, neglect of duty, malfeasance in office, not restricting, however, under *Shurtleff* v. *United States*, 189 U. S. 311, the President's power to remove for other than the causes specified", citing the Acts creating the Interstate Commerce Commission, the Board of General Appraisers, the Federal Trade Commission, the United States Shipping Board, and the United States Tariff Commission. In neither of the other two opinions announced in the *Myers* case was this application of the rule of construction controverted.

There are, moreover, special reasons why the rule of construction in the *Shurtleff* case is controlling with respect to the Federal Trade Commission Act. That case was decided in 1903. The Federal Trade Commission Act was enacted in 1914, containing language identical with that which had been construed in the *Shurtleff* case. It is a cardinal principle of statutory interpretation that the meaning of words in a statute must be determined in the light of judicial interpretation given to such words in similar previous legislation. In adopting the language used in the earlier Act, Congress must be considered to have adopted also the construction given by this Court to that language and to have made it a part of the enactment. *Hecht* v. *Malley*, 265 U. S. 144, 153; *United States* v. *Mer-*

riam, 263 U. S. 179, 187; *Heald* v. *District of Columbia*, 254 U. S. 20, 23; *Hackfeld & Co.* v. *United States*, 197 U. S. 442, 451; *Kepner* v. *United States*, 195 U. S. 100, 124; *Northern Pacific R. R. Co.* v. *Mutser-Sauntry Co.*, 168 U. S. 604, 608; *The "Abbotsford"*, 98 U. S. 440.[1]

This construction of the intent of Congress in the Federal Trade Commission Act is confirmed by consideration of the language used by it in comparable legislation. In 1908, five years after the decision in the *Shurtleff* case, the Customs Administrative Act was amended to provide that a General Appraiser could be removed for inefficiency, neglect of duty, or malfeasance in office, "and no other" cause. C. 205, 35 Stat. 403, 406. The history of this amendment reveals that it was adopted in order to change the meaning of the Act as previously construed by this Court.[2] It is unnecessary to determine whether that construction correctly reflected the intention of Congress in 1890 when the original Act was passed. In the case at bar the correctness of the decision in the *Shurtleff* case, as applied to the statute there involved, has

[1] Similarly, where a statute of one jurisdiction is adopted by another, its previous construction by the courts of the former will be regarded as incorporated at the time of adoption. *Marlin* v. *Lewallen*, 276 U. S. 58, 62–63; *James* v. *Appel*, 192 U. S. 129, 135; *Robinson & Co.* v. *Belt*, 187 U. S. 41, 47–48; *Willis* v. *Eastern Trust and Banking Co.*, 169 U. S. 295, 307–308.

[2] See 42 Cong. Rec. 5036 (Statement of Mr. Payne, in charge of the bill).

not been challenged. The significant fact is that Congress was aware of the construction given to the Act by this Court and, in order to change that declared meaning, changed the terms of the Act.

Not only in the Act of 1908 amending the Customs Administrative Act, but in a number of other statutes as well, Congress has attempted by explicit language to limit the removal power to specified causes and no others. Of these statutes, one was enacted before the Federal Trade Commission Act and the remainder after that Act. They include the Acts creating a Commissioner of Mediation and Conciliation (July 15, 1913, c. 6, Sec. 11, 38 Stat. 103, 108); the Board of Tax Appeals (June 2, 1924, c. 234, Sec. 900 (b), 43 Stat. 253, 336); the Railroad Labor Board (Feb. 28, 1920, c. 91, Sec. 306 (b), 41 Stat. 456, 470); the United States Coal Commission (Mar. 4, 1923, c. 248, Sec. 1, 42 Stat. 1446); the Board of Mediation (May 20, 1926, c. 347, Sec. 4, 44 Stat. 577, 579); and the National Mediation Board (June 21, 1934, c. 691, Sec. 4, 48 Stat. 1193).

It thus appears that the *Shurtleff* case established a rule of construction of a phrase frequently employed with respect to removals (page 8, footnote 1, *supra*); that the same phrase was later used in a similar context in the Federal Trade Commission Act; and that a different phrase aptly chosen to express a different intent has been used both before and since the enactment of that Act. The existence of the rule of construction is, in such

circumstances, controlling in interpreting the language used.

The plaintiff seeks to avoid the rule of the *Shurtleff* case upon three grounds. He contends, first, that the language of the Federal Trade Commission Act differs from that of the Customs Administrative Act, in that the Federal Trade Commission Act provides that each Commissioner shall "continue in office" for the term specified. This contention is unfounded. The language relied upon, even if it were significant, is inapplicable, for it is used only with reference to the "first Commissioners." As to their "successors", the Act provides simply that they "shall be appointed for terms of seven years." The phrase "continue in office", applying as it does only to the original appointees, is obviously an expression of style without legal significance. The term prescribed is not a grant of tenure but a limitation. *Parsons v. United States*, 167 U. S. 324; *Burnap* v. *United States*, 252 U. S. 512, 515.

The plaintiff contends, in the second place, that the *Shurtleff* case is inapplicable because the Customs Administrative Act, unlike the Federal Trade Commission Act, provided no fixed term of office, and an unconfined removal power furnished a means of limiting the tenure. But no such limitation of the case has ever been suggested by this Court. On the contrary, the case has been recog-

nized as authority for the proposition that irrespective of tenure, the enumeration by Congress of certain grounds for removal does not constitute an intention to limit the power of the President to removal for those causes alone. *Myers* v. *United States*, 272 U. S. 52, 171, 262. This established construction does not deprive the enumeration of purpose and effect. The specification of certain grounds for removal may serve to indicate a policy regarding the holding of office, guiding but not limiting the President's discretion in exercising the removal power. In addition, the specification has the effect, as this Court has held and as the plaintiff recognizes, of requiring notice and hearing if an officer is removed for one of the causes designated. *Shurtleff* v. *United States*, 189 U. S. 311, 317:

> It may be said, however, that there is some use for the provision for removal for the causes named in the statute. A removal for any of those causes can only be made after notice and an opportunity to defend, and therefore, if a removal is made without such notice, there is a conclusive presumption that the officer was not removed for any of those causes, and his removal cannot be regarded as the least imputation on his character for integrity or capacity. Other causes for removal may, however, exist, and be demanded by the interests of the service, in order that the office may be better conducted, although the officer may not be proved guilty

> of conduct coming within the statute as a cause for removal. * * *

Statutes not infrequently enumerate powers which are not intended to be exclusive. *Springer* v. *Philippine Islands*, 277 U. S. 189, 206; *Continental Illinois National Bank & Trust Co.* v. *Chicago, R. I. & P. Ry. Co.*, decided April 1, 1935, Nos. 479–490.

That the decision in the *Shurtleff* case rested not on the nature of the tenure but on the language employed in the statute appears from the opinion in that case (189 U. S. at 318):

> But we are not shut up to the necessity of finding some other and more plausible reason for the use of this language or else to adopt the meaning contended for by the appellant. The right of removal, as we have already remarked, would exist as inherent in the power of appointment unless taken away in plain and unambiguous language. This has not been done, and although language has been used from which we might speculate or guess that possibly Congress did intend the meaning contended for by appellant, yet it has not in fact expressed that meaning in words plain enough to call upon the courts to determine that such intention existed.

The plaintiff contends, finally, that the rule of the *Shurtleff* case is inapplicable because the Federal Trade Commission was created as an inde-

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The suggestion in *Reagan* v. *United States*, 182 U. S. 419, that notice and hearing are required in removals from offices with fixed tenure, cannot be regarded as authoritative in view of the *Myers* case.

pendent, nonpartisan, administrative agency. It is true, as the legislative history of the Act indicates, that the Commission was intended to be or to become an experienced and informed body, free from certain of the handicaps that were deemed to inhere in departmental organization. But there is nothing in the language or the legislative history of the Act to suggest that these purposes were thought to require a limitation of the removal power to the causes named. Nor are the Federal Trade Commission and the Board of General Appraisers so unlike in nature as to call for a departure by the Court from the construction given in the *Shurtleff* case to the words in question. The two agencies are, in fact, strikingly similar in the relevant essentials of organization and functions.

Prior to the Customs Administrative Act of 1890, cases of contested appraisals were submitted to merchant appraisers for redetermination. The Act of 1890 abolished the institution of merchant appraisers but recognized the need of a disinterested tribunal to pass upon such controversies, to which the United States was a party. The Act of 1890 provided for "general appraisers", from whose decisions appeals lay to a board consisting of three of the general appraisers; and from the decisions of the board an appeal could be taken to a circuit court. The general appraisers were authorized to administer oaths and to cite persons to appear before them. Not more than five of the nine general appraisers could be members of the

same political party. The board of general appraisers has been characterized as a tribunal clothed with judicial power to determine the classification of imported goods and the duties which should be imposed thereon. *United States* v. *Kurtz*, 5 Ct. Cust. App. 144, 146; *Marine* v. *Lyon*, 65 Fed. 992, 994 (C. C. A. 4th); compare *United States* v. *Lies*, 170 U. S. 628, 636. The nature of its functions is revealed by the fact that in 1926 the name of the board of general appraisers was changed to the United States Customs Court. Act of May 28, 1926, c. 411, 44 Stat. 669.

The independence which Congress sought for the Federal Trade Commission does not depend upon an implied limitation of the removal power such as that contended for by the plaintiff. Congress provided in unmistakable terms for other safeguards designed to achieve that independence. The Commission was left free from the continuing supervision of a departmental head; its membership was required to represent more than one political party; and the terms of its members were arranged to expire at different times. In later Acts creating similar commissions these factors alone have apparently been deemed sufficient to secure the objective of an independent body. Compare, for example, the Acts creating the United States Employees' Compensation Commission (Sept. 7, 1916, c. 458, 39 Stat. 742), the Federal Radio Commission (Feb. 23, 1927, c. 169, 44 Stat. 1162), the Federal Power Commission (June 23, 1930, c. 572, 46 Stat. 797),

The Federal Home Loan Bank Board (July 22, 1932, c. 522, Sec. 17, 47 Stat. 725, 736), the Securities and Exchange Commission (June 6, 1934, c. 404, Sec. 4, 48 Stat. 885); and the Federal Communications Commission (June 19, 1934, c. 652, Sec. 4, 48 Stat. 1066). Each of these Acts provides that not more than a bare majority of the members of the Commission shall belong to the same political party; and each provides that the members of the commission shall have overlapping terms. In none of these Acts did Congress impose any limitation on removal. The effect of this omission is that the power of removal is unrestricted, since the power to remove, at least in the absence of constitutional or statutory provision, is an incident of the power to appoint. *Parsons* v. *United States,* 167 U. S. 324; *Burnap* v. *United States,* 252 U. S. 512, 515; *Wallace* v. *United States,* 257 U. S. 541, 544. Whatever the reason for the omission in these Acts, it is clear at all events that it was not regarded as nullifying the other safeguards of indepedence which are included in these Acts as in the Federal Trade Commission Act.

It is submitted, therefore, that it is a settled rule of construction that the mere statutory enumeration of causes for which an appointee may be removed does not confine the exercise of the President's power to removal for one or more of those causes; that there is nothing in the language or history of the Federal Trade Commission Act to suggest that Congress departed from this estab-

lished meaning; and that, therefore, as this Court was agreed in the *Myers* case, the answer to the first question certified should be "No."

The construction for which the plaintiff contends not only is at variance with the applicable decisions of this Court, but raises constitutional questions of a serious nature. It might properly be rejected even if the case were less clear than it is. Compare *Bratton* v. *Chandler*, 260 U. S. 110, 114; *United States* v. *Standard Brewery*, 251 U. S. 210, 220; *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401; *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 422, and *Knights Templars' Indemnity Company* v. *Jarman*, 187 U. S. 197, 205. In the case at bar, such a construction "should not be made in the absence of compelling language." *Missouri Pacific Railroad Company* v. *Ault*, 256 U. S. 554, 559.

II

IF SECTION 1 OF THE FEDERAL TRADE COMMISSION ACT CONFINES THE POWER OF REMOVAL TO THE CAUSES STATED THEREIN, IT IS AN UNCONSTITUTIONAL INTERFERENCE WITH THE EXECUTIVE POWER OF THE PRESIDENT

Only if the first question is answered in the affirmative does it become necessary to answer the second question. If the Court should be of the opinion that Section 1 of the Federal Trade Commission Act deprives the President of the power to remove a Commissioner except for one or more of the causes stated, we submit that the provision is unconstitutional.

The power of the President to remove officers appointed by him with the advice and consent of the Senate was fully considered in the *Myers* case, *supra*, 272 U. S. 52. It was there held that the attempt of Congress to require the participation of the Senate in the removal of postmasters by the President was an invalid interference with the executive power reposed in the President by the Constitution. In the case at bar, the nature of the interference by Congress and the office in question are not the same as in the *Myers* case. But neither of these differences alters the principle laid down in that case. The implications, and indeed the expressions, in the opinion of the Chief Justice show that the conclusion of the Court was regarded as governing a case like the one at bar.

With reference to provisions which specify causes for which the President may remove, the Chief Justice, after referring to the rule of the *Shurtleff* case as applicable to the Interstate Commerce Act and similar legislation, continued (272 U. S., at 172):

> There are other later acts pointed out in which, doubtless, the inconsistency with the independent power of the President to remove is clearer, but these cannot be said really to have received the acquiescence of the executive branch of the Government.

Thus the Court disposed of the argument based on such statutes not by distinguishing them from the Act there in question, but by noting that their validity had not been assumed by the Executive.

The conclusion that a statute limiting the President's removal power to removal for certain causes is as unwarranted an interference with the executive power as is a statute requiring participation by the Senate in a removal is manifestly sound. Participation by the Senate in removal is closely allied with the necessity of securing its advice and consent for the appointment of a successor to the officer removed. In fact, Senatorial approval of a subsequent appointment is regarded as tantamount to approval of the removal. *Wallace* v. *United States*, 257 U. S. 541; 258 U. S. 296. It was precisely because consent to removal was implied in consent to the appointment of a successor that the validity of the former requirement was for many years not drawn in question. No such merging of Senatorial functions characterizes the requirement that the President may remove for certain causes only. The power of the President to remove an officer in whom he does not have adequate confidence is effectively thwarted, and the consent of the Senate to the appointment of a qualified successor is of no avail. Consequently the enumeration of exclusive grounds for removal is in some respects a more substantial usurpation of the executive power than was the provision requiring Senatorial approval which was held invalid in the *Myers* case.

If Congress can provide that the President may remove only for inefficiency, neglect of duty, or malfeasance in office, it presumably could provide that he might remove only for malfeasance in office

or only for neglect of duty. The result would be that the President would have no power, even with the aid of the Senate, to remove an admittedly inefficient officer in the executive branch of the Government.

But even where, as in the Federal Trade Commission Act, Congress has specified three grounds for removal, a limitation to one or more of these grounds is a substantial interference with the constitutional duty of the President to "take care that the laws be faithfully executed." Faithful execution of the laws may require more than freedom from inefficiency, neglect of duty, or malfeasance in office. Particularly in the case of those officers entrusted with the task of enforcing new legislation, such as the Securities Act of 1933, which embodies new concepts of Federal regulation in the public interest, faithful execution of the laws may presuppose wholehearted sympathy with the purposes and policy of the law, and energy and resourcefulness beyond that of the ordinarily efficient public servant. The President should be free to judge in what measure these qualities are possessed and to act upon that judgment.

There is nothing in the nature and functions of a Federal Trade Commissioner to require a different result from that reached in the *Myers* case. On this point the conclusion of the Court in that case is not left to inference. The Chief Justice said (p. 135):

> Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.

The so-called legislative functions performed by the Federal Trade Commission do not differ in nature from those performed by the regular executive departments. Reports to Congress on special topics are made by the Commission; but such reports are likewise made by the heads of departments.[5]

The Federal Trade Commission is not a judicial tribunal. As was said by this Court in *Federal Trade Commission* v. *Eastman Kodak Company*, 274 U. S. 619, 623:

> The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers. *National Harness, etc.*,

[5] The following are recent examples of requests for information addressed to the heads of departments:

71st Congress, 3d session.—S. Res. 355, 74 Cong. Rec. 815 (Secretary of Labor); S. Res. 366, *id.*, p. 1043 (Secretary of

Association v. *Federal Trade Commission* (C. C. A.), 268 Fed. 705, 707; *Chamber of Commerce* v. *Federal Trade Commission* (C. C. A.), 280 Fed. 45, 48. It has not been delegated the authority of a court of equity. * * *

Thus the Commission does not have the power of a court to execute its orders; they must be enforced by the Circuit Courts of Appeals. We need not

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the Treasury); S. Res. 377, *id.*, p. 6163 (Secretary of Agriculture); S. Res. 394, *id.*, p. 2739 (Postmaster General); S. Res. 430, *id.*, p. 7109 (Secretary of Labor); S. Res. 494, *id.*, p. 7104 (Secretary of the Treasury).

72d Congress, 1st session.—S. J. Res. 108, 75 Cong. Rec. 8360 (Secretary of Agriculture); S. Res. 123, *id.*, p. 1172 (Secretary of Commerce); S. Res. 124, *id.*, p. 1172 (Secretary of Agriculture); S. Res. 128, *id.*, p. 1413 (Postmaster General, Secretaries of the Treasury, War, Agriculture, Commerce and Interior); S. Res. 150, *id.*, p. 2862 (Secretary of War); S. Res. 220, *id.*, p. 12748 (Secretary of Commerce); S. Res. 276, *id.*, p. 15348 (Secretary of the Treasury); S. Res. 281, *id.*, p. 15675 (Secretary of Agriculture).

72d Congress, 2d session.—S. Res. 376, 76 Cong Rec. 5310 (Secretary of Agriculture).

73d Congress, 1st session.—S. Res. 65, 77 Cong. Rec. 2656 (Secretary of Agriculture).

73d Congress, 2d session.—S. Res. 121, 78 Cong. Rec. 177 (Secretary of Agriculture); S. Res. 138, *id.*, p. 1054 (Secretary of Labor); S. Res. 205, *id.*, p. 4574 (Secretary of Agriculture); S. Res. 209, *id.*, p. 4579 (Secretary of the Treasury).

74th Congress, 1st session.—S. Res. 17, 79 Cong. Rec. 138 (Secretary of Agriculture); S. Res. 41, *id.*, p. 420 (Secretary of Agriculture); S. Res. 64, *id.*, p. 3655 (Department of Justice); S. Res. 67, *id.*, p. 1450 (Secretary of Labor).

In some of these instances it was believed that the information was already available; in others further investigation was thought necessary.

consider, therefore, whether the President's power to remove a judge of a court not established under Article III of the Constitution may be restricted by Congress. Compare *McAllister* v. *United States*, 141 U. S. 174.

The so-called quasi-judicial functions of the Commission are not different from those regularly committed to the executive departments. Functions so committed include the determination of a wide range of controversies respecting such important matters as immigration, *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329; internal revenue and customs duties, *Blair* v. *Oesterlein Machine Company*, 275 U. S. 220; *Louisiana* v. *McAdoo*, 234 U. S. 627; public-land claims, *United States* v. *Hitchcock*, 190 U. S. 316; pension claims, *Decatur* v. *Paulding*, 14 Peters 497; use of the mails, *Houghton* v. *Payne*, 194 U. S. 88; practices at stockyards, *Tagg Bros. & Moorhead*, 280 U. S. 420; trading in grain futures, *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1.

To ignore the extent to which these functions have been conferred upon the regular executive departments is to ignore much of the development of administrative law in this country. It cannot be questioned that the head of a department, however numerous or important may be his functions of this kind, is subject to removal by the President without limitation by Congress, under the decision in the *Myers* case. The power to remove heads of departments was in fact the foundation upon

which the result in the *Myers* case was rested. An attempt to distinguish, in respect of the President's removal power, between various administrative agencies would logically require distinctions also between the same agency at different times. Such attempts, which could not fail to create uncertainty and confusion, have no justification in fact or in law.

We submit, therefore, that if the Court should find it necessary to consider the second question certified, it should be answered in the negative.

CONCLUSION

The first question certified should be answered in the negative. If, however, it is answered in the affirmative, the second question should be answered in the negative.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 667.—October Term, 1934.

Samuel F. Rathbun, as Executor of the Estate of William E. Humphrey, Deceased, vs. The United States. } On Certificate from the Court of Claims.

[May 27, 1935.]

Mr. Justice Sutherland delivered the opinion of the Court.

Plaintiff brought suit in the Court of Claims against the United States to recover a sum of money alleged to be due the deceased for salary as a Federal Trade Commissioner from October 8, 1933, when the President undertook to remove him from office, to the time of his death on February 14, 1934. The court below has certified to this court two questions (Act of February 13, 1925, § 3 (a), c. 229, 43 Stat. 936, 939, 28 U. S. C. § 288), in respect of the power of the President to make the removal. The material facts which give rise to the questions are as follows:

William E. Humphrey, the decedent, on December 10, 1931, was nominated by President Hoover to succeed himself as a member of the Federal Trade Commission, and was confirmed by the United States Senate. He was duly commissioned for a term of seven years expiring September 25, 1938; and, after taking the required oath of office, entered upon his duties. On July 25, 1933, President Roosevelt addressed a letter to the commissioner asking for his resignation, on the ground "that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection", but disclaiming any reflection upon the commissioner personally or upon his services. The commissioner replied, asking time to consult his friends. After some further correspondence upon the subject, the President on August 31, 1933, wrote the commissioner expressing the hope that the resignation would be forthcoming and saying:

"You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the ad-

ministering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence."

The commissioner declined to resign; and on October 7, 1933, the President wrote him:

"Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission."

Humphrey never acquiesced in this action, but continued thereafter to insist that he was still a member of the commission, entitled to perform its duties and receive the compensation provided by law at the rate of $10,000 per annum. Upon these and other facts set forth in the certificate, which we deem it unnecessary to recite, the following questions are certified:

"1. Do the provisions of section 1 of the Federal Trade Commission Act, stating that 'any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office', restrict or limit the power of the President to remove a commissioner except upon one or more of the causes named?

"If the foregoing question is answered in the affirmative, then—

"2. If the power of the President to remove a commissioner is restricted or limited as shown by the foregoing interrogatory and the answer made thereto, is such a restriction or limitation valid under the Constitution of the United States?"

The Federal Trade Commission Act, c. 311, 38 Stat. 717; 15 U. S. C. §§ 41, 42, creates a commission of five members to be appointed by the President by and with the advice and consent of the Senate, and § 1 provides:

"Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. . . ."

Sec. 5 of the act in part provides:

"That unfair methods of competition in commerce are hereby declared unlawful.

"The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce."

In exercising this power, the commission must issue a complaint stating its charges and giving notice of hearing upon a day to be fixed. A person, partnership, or corporation proceeded against is given the right to appear at the time and place fixed and show cause why an order to cease and desist should not be issued. There is provision for intervention by others interested. If the commission finds the method of competition is one prohibited by the act, it is directed to make a report in writing stating its findings as to the facts, and to issue and cause to be served a cease and desist order. If the order is disobeyed, the commission may apply to the appropriate circuit court of appeals for its enforcement. The party subject to the order may seek and obtain a review in the circuit court of appeals in a manner provided by the act.

Sec. 6, among other things, gives the commission wide powers of investigation in respect of certain corporations subject to the act, and in respect of other matters, upon which it must report to Congress with recommendations. Many such investigations have been made, and some have served as the basis of congressional legislation.

Sec. 7 provides:

"That in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require."

First. The question first to be considered is whether, by the provisions of § 1 of the Federal Trade Commission Act already quoted, the President's power is limited to removal for the specific causes enumerated therein. The negative contention of the government is based principally upon the decision of this court in *Shurtleff* v. *United States*, 189 U. S. 311. That case involved the

power of the President to remove a general appraiser of merchandise appointed under the Act of June 10, 1890, 26 Stat. 131. Sec. 12 of the act provided for the appointment by the President, by and with the advice and consent of the Senate, of nine general appraisers of merchandise, who "may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office." The President removed Shurtleff without assigning any cause therefor. The Court of Claims dismissed plaintiff's petition to recover salary, upholding the President's power to remove for causes other than those stated. In this court Shurtleff relied upon the maxim *expressio unius est exclusio alterius;* but this court held that, while the rule expressed in the maxim was a very proper one and founded upon justifiable reasoning in many instances, it "should not be accorded controlling weight when to do so would involve the alteration of the universal practice of the government for over a century and the consequent curtailment of the powers of the executive in such an unusual manner." What the court meant by this expression appears from a reading of the opinion. That opinion—after saying that no term of office was fixed by the act and that, with the exception of judicial officers provided for by the Constitution, no civil officer had ever held office by life tenure since the foundation of the government—points out that to construe the statute as contended for by Shurtleff would give the appraiser the right to hold office during his life or until found guilty of some act specified in the statute, the result of which would be a complete revolution in respect of the general tenure of office, effected by implication with regard to that particular office only.

"We think it quite inadmissible", the court said (pp. 316, 318), "to attribute an intention on the part of Congress to make such an extraordinary change in the usual rule governing the tenure of office, and one which is to be applied to this particular office only, without stating such intention in plain and explicit language, instead of leaving it to be implied from doubtful inferences. . . . We cannot bring ourselves to the belief that Congress ever intended this result while omitting to use language which would put that intention beyond doubt."

These circumstances, which led the court to reject the maxim as inapplicable, are exceptional. In the face of the unbroken precedent against life tenure, except in the case of the judiciary, the conclusion that Congress intended that, from among all other civil

officers, appointees alone should be selected to hold office for life was so extreme as to forbid, in the opinion of the court, any ruling which would produce that result if it reasonably could be avoided. The situation here presented is plainly and wholly different. The statute fixes a term of office, in accordance with many precedents. The first commissioners appointed are to continue in office for terms of three, four, five, six, and seven years, respectively; and their successors are to be appointed for terms of seven years—any commissioner being subject to removal by the President for inefficiency, neglect of duty, or malfeasance in office. The words of the act are definite and unambiguous.

The government says the phrase "continue in office" is of no legal significance and, moreover, applies only to the first commissioners. We think it has significance. It may be that, literally, its application is restricted as suggested; but it, nevertheless, lends support to a view contrary to that of the government as to the meaning of the entire requirement in respect of tenure; for it is not easy to suppose that Congress intended to secure the first commissioners against removal except for the causes specified and deny like security to their successors. Putting this phrase aside, however, the fixing of a definite term subject to removal for cause, unless there be some countervailing provision or circumstance indicating the contrary, which here we are unable to find, is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause. But if the intention of Congress that no removal should be made during the specified term except for one or more of the enumerated causes were not clear upon the face of the statute, as we think it is, it would be made clear by a consideration of the character of the commission and the legislative history which accompanied and preceded the passage of the act.

The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts "appointed by law and informed by experience". *Illinois Cent. &c. R. R. v. Inter. Com. Comm.*, 206 U. S. 441, 454; *Standard Oil Co. v. United States*, 283 U. S. 235, 238-239.

The legislative reports in both houses of Congress clearly reflect the view that a fixed term was necessary to the effective and fair administration of the law. In the report to the Senate (No. 597, 63d Cong., 2d Sess., pp. 10-11) the Senate Committee on Interstate Commerce, in support of the bill which afterwards became the act in question, after referring to the provision fixing the term of office at seven years, so arranged that the membership would not be subject to complete change at any one time, said:

"The work of this commission will be of a most exacting and difficult character, demanding persons who have experience in the problems to be met—that is, a proper knowledge of both the public requirements and the practical affairs of industry. It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience."

The report declares that one advantage which the commission possessed over the Bureau of Corporations (an executive subdivision in the Department of Commerce which was abolished by the act) lay in the fact of its independence, and that it was essential that the commission should not be open to the suspicion of partisan direction. The report quotes (p. 22) a statement to the committee by Senator Newlands, who reported the bill, that the tribunal should be of high character and "independent of any department of the government. . . . a board or commission of dignity, permanence, and ability, independent of executive authority, except in its selection, and independent in character."

The debates in both houses demonstrate that the prevailing view was that the commission was not to be "subject to anybody in the government but . . . only to the people of the United States"; free from "political domination or control" or the "probability or possibility of such a thing"; to be "separate and apart from any existing department of the government—not subject to the orders of the President".

More to the same effect appears in the debates, which were long and thorough and contain nothing to the contrary. While the general rule precludes the use of these debates to explain the meaning of the words of the statute, they may be considered as reflecting light upon its general purposes and the evils which it sought to remedy. *Fed. Trade Comm.* v. *Raladam Co.*, 283 U. S. 643, 650.

Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

We conclude that the intent of the act is to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here; and we pass to the second question.

Second. To support its contention that the removal provision of § 1, as we have just construed it, is an unconstitutional interference with the executive power of the President, the government's chief reliance is *Myers* v. *United States*, 272 U. S. 52. That case has been so recently decided, and the prevailing and dissenting opinions so fully review the general subject of the power of executive removal, that further discussion would add little of value to the wealth of material there collected. These opinions examine at length the historical, legislative and judicial data bearing upon the question, beginning with what is called "the decison of 1789" in the first Congress and coming down almost to the day when the opinions were delivered. They occupy 243 pages of the volume in which they are printed. Nevertheless, the narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of *stare decisis*. In so far as they are out of harmony with the views here set forth, these expressions are disapproved. A like situation was presented in the case of *Cohens* v. *Virginia*, 6 Wheat. 264, 399, in respect of certain general expressions in the opinion in *Marbury* v. *Madison*, 1 Cranch

127. Chief Justice Marshall, who delivered the opinion in the *Marbury* case, speaking again for the court in the *Cohens* case, said:

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

And he added that these general expressions in the case of *Marbury v. Madison* were to be understood with the limitations put upon them by the opinion in the *Cohens* case. See, also, *Carroll* v. *Lessee of Carroll et al.*, 16 How. 275, 286-287; *O'Donoghue* v. *United States*, 289 U. S. 516, 550.

The office of a postmaster is so essentially unlike the office now involved that the decision in the *Myers* case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. Putting aside *dicta*, which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include all purely executive officers. It goes no farther,—much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of "unfair methods of competi-

tion"—that is to say in filling in and administering the details embodied by that general standard—the commission acts in part quasi-legislatively and in part quasi-judicially. In making investigations and reports thereon for the information of Congress under § 6, in aid of the legislative power, it acts as a legislative agency. Under § 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government.*

If Congress is without authority to prescribe causes for removal of members of the trade commission and limit executive power of removal accordingly, that power at once becomes practically all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution. The Solicitor General, at the bar, apparently recognizing this to be true, with commendable candor, agreed that his view in respect of the removability of members of the Federal Trade Commission necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims. We are thus confronted with the serious question whether not only the members of these quasi-legislative and quasi-judicial bodies, but the judges of the legislative Court of Claims, exercising judicial power (*Williams* v. *United States*, 289 U. S. 553, 565-567), continue in office only at the pleasure of the President.

We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause, in the

*The provision of § 6 (d) of the act which authorizes the President to direct an investigation and report by the commission in relation to alleged violations of the anti-trust acts, is so obviously collateral to the main design of the act as not to detract from the force of this general statement as to the character of that body.

meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. James Wilson, one of the framers of the Constitution and a former justice of this court, said that the independence of each department required that its proceedings "should be free from the remotest influence, direct or indirect, of either of the other two powers." Andrews, The Works of James Wilson (1896), vol. 1, p. 367. And Mr. Justice Story in the first volume of his work on the Constitution, 4th ed., § 530, citing No. 48 of the Federalist, said that neither of the departments in reference to each other "ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers". And see *O'Donoghue* v. *United States, supra,* at pp. 530-531.

The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.

In the light of the question now under consideration, we have reexamined the precedents referred to in the *Myers* case, and find nothing in them to justify a conclusion contrary to that which we have reached. The so-called "decision of 1789" had relation to a bill proposed by Mr. Madison to establish an executive Department of Foreign Affairs. The bill provided that the principal officer was "to be removable from office by the President of the United States". This clause was changed to read "whenever the principal officer shall be removed from office by the President of

the United States" certain things should follow, thereby, in connection with the debates, recognizing and confirming, as the court thought in the *Myers* case, the sole power of the President in the matter. We shall not discuss the subject further, since it is so fully covered by the opinions in the *Myers* case, except to say that the office under consideration by Congress was not only purely executive, but the officer one who was responsible to the President, and to him alone, in a very definite sense. A reading of the debates shows that the President's illimitable power of removal was not considered in respect of other than executive officers. And it is pertinent to observe that when, at a later time, the tenure of office for the Comptroller of the Treasury was under consideration, Mr. Madison quite evidently thought that, since the duties of that office were not purely of an executive nature but partook of the judiciary quality as well, a different rule in respect of executive removal might well apply. 1 Annals of Congress, cols. 611-612.

In *Marbury v. Madison*, *supra*, pp. 162, 165-166, it is made clear that Chief Justice Marshall was of opinion that a justice of the peace for the District of Columbia was not removable at the will of the President; and that there was a distinction between such an officer and officers appointed to aid the President in the performance of his constitutional duties. In the latter case, the distinction he saw was that "their acts are his acts" and his will, therefore, controls; and, by way of illustration, he adverted to the act establishing the department of Foreign Affairs, which was the subject of the "decision of 1789."

The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

To the extent that, between the decision in the *Myers* case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall re-

main a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.

In accordance with the foregoing, the questions submitted are answered.

Question No. 1, Yes.
Question No. 2, Yes.

Mr. Justice McREYNOLDS agrees that both questions should be answered in the affirmative. A separate opinion in *Myers* v. *United States*, 272 U. S. 178, states his views concerning the power of the President to remove appointees.

A true copy.

Test:

Clerk, Supreme Court, U. S.